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Supreme Court of the United States

MARCOS CARRASQUILLO
PETITIONER

Vs.

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Whether the District Court acted without jurisdiction when it transferred the juvenile to adult federal jurisdiction.

2. Whether failure by the US District Court to: (a) receive the prior juvenile, records or (b) a certification by the clerk of the juvenile court in writing that the juvenile has no prior record or that the record is unavailable and why is it unavailable (18 USC 5032, par. 10) means, as a matter of law, that the Federal Court acted without jurisdiction when it ordered the transfer of the juvenile.

3. Whether a good faith effort to obtain the records is sufficient to satisfy the letter of the cited law absent a Certificate of Unavailability by the Clerk of the Juvenile Court which would comply with the law.

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VI. STATEMENT OF JURISDICTION:

There is jurisdiction in this case under 18 USC 1254(1) where the Court of Appeals for the First Circuit entered Judgment on December 11, 2001 (See Appendix 11) denying the request for a Certificate of Appealability, a Motion For Rehearing was timely filed on December 26, 2001(See Appendix 12) and its denial on January 31, 2002 (See Appendix 13).

A copy of this Petition is being mailed by certified mail to the Solicitor General at his official address.

VII. CONSTITUTIONAL PROVISIONS, AND STATUTES, INVOLVED IN THE CASE

18 U.S.C. 5032. Delinquency proceedings in district court; transfer for criminal prosecution (See Appendix #15)

VIII. CONCISE STATEMENT OF THE CASE:

1. Juvenile Marcos Carrasquillo was transferred to adult jurisdiction under 18 USC 5032 and subsequently upon a plea agreement sentenced by the District Court under its adult jurisdiction.

2. A motion under 18 USC 2255 was timely filed arguing inadequate representation and lack of jurisdiction for non-compliance with 18 USC 5032. (See Appendix 1)

3. The District Court referred the matter to the Magistrate Judge and a Report and Recommendations was emitted (See Appendix 4).

4. Objections to the Report and Recommendation were timely presented arguing, among other things, that finding where erroneous as to the lack of a previous psychological record, and as to the ability of the juvenile to understand the proceedings and other matters.

5. The District Court concluded, among other things, that there was no prior juvenile record as attested by the Presentence Report, but from the record it is otherwise shown: according to a motion by the PreTrial Services Office of January 11, 1996, (See Appendix 14 p.4, page. 3) defendant had a prior record at the Carolina Juvenile Court. It is also mentioned (Id. p.2) that the juvenile had resided in other jurisdictions of the United States and no effort is documented regarding the abstention of the corresponding Juvenile Court records.

6. The District Court denied the Motion for Certificate of Appealability (See Appendix 9) and timely appeal was filed before the Circuit Court (See Appendix 10). The Circuit Court affirmed (See Appendix 11) and denied a Petition for Rehearing on January 31 2002. (See Appendix 13)

IX. CONCISE ARGUMENT:

The Circuit Courts have ruled in a disparate manner regarding the jurisdiction of federal Courts over Juveniles and the statutory requirements established by the Congress since 1984 in 18 U.S.C. 5032.

A. Under the law a Court may not transfer a juvenile to adult jurisdiction without compliance with 18 USC 5032

1. Section 5032 (Par 10)[1] in its pertinent provides that: "A juvenile shall not be transferred to adult prosecution nor shall a hearing be held under section 5037 (disposition after a finding of juvenile delinquency) until any prior juvenile court records of such juvenile have been received by the court, or the clerk of the juvenile court has certified in writing that the juvenile has no prior record, or that the juvenile's record is unavailable and why it is unavailable." The following Circuits appear to be in conflict with all or almost all others Circuits, United States v. One Male Juvenile, 117 F 3d 1415 (4th Cir. 1997) where a summary of the juvenile's records in a pre-sentence was deemed sufficient to satisfy the requirements of the law, calling it a "procedural error" and adopting United States v. Parker 956 F 2d 169 (8th Cir. 1992).

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[1] 18 USC 5032

2. Since the law was amended in 1984 to add the jurisdictional requisite that "any proceedings" against a minor may be not be commenced prior to the filing of the juvenile's court record or certification of unavailability. A later amendment of 1994 established the dispositional hearing of section 5037 (not "any" proceedings") as the specific proceeding that cannot be started absent the juvenile record or a certification of unavailability, the majority of the Circuits have decided according, to the clear letter of the law: the failure to file the record or the certification of unavailability by the clerk of the juvenile court deprives the District Court of jurisdiction to proceed against the juvenile as an adult defendant. All the cases on appeal (a minority of Circuits as we will show) that have adopted a "good faith effort"[2] as a substitute to the filing of the record or clerk certificate have decided to supersede the language of the law, fail to explain (a) why a deviation from the letter of the statute is permissible and (b) why is the government "also" excused form obtaining a Certification of Unavailability from the Clerk of the Juvenile Court. The explanation may be that the government in those cases did not comply at all with the requirement as the law mandates and was not in time (or ever will be) for obtaining a simple certification if the record is not available, or the record itself if the Clerk of

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[2] United States v. MIM, 923 F2d 1016 (1st Cir 1991), United States v Wong, 40 F3d 1347 (2 nd Cir 1994), United States v NJB, 104 F 3d 630 (4th Cir 1997)

the Juvenile Court results having the duly requisitioned juvenile record.

3. Disparity among the Circuits regarding this crucial jurisdictional matter was again underlined when in 1997 two Circuits defined the jurisdictional nature of the Juvenile Court record requirement in opposite ways: while according to the Fourth Circuit[3] "good faith efforts" to produce the record where in accord to legislative intent; the Third Circuit[4] decided that neither the language of the statute nor its legislative history allowed for a "good faith effort" to be sufficient to comply with the record provision requirement.

4. The District Court in the present case (See Appendix 9) cites sec. 5032 (Par. 10) embraces the "good faith effort" as sufficient to comply with the jurisdictional requirement contrary to MIM. supra , where the First Circuit , later followed by the majority of the Circuits , adopted the "clear letter of the law". Standard. In the present case the First Circuit confirms the District Court and reverts its own precedent, which is still observed by the greater number of the appellate Courts. As the First Circuit originally asserted, the law was clear, making any interpretation unnecessary. Previous to the 1994 amendment Congress adopted the following text for section 5032 (Par. 10):" A juvenile shall not be transferred to adult

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[3] United States v NJB, 104 F 3d 630 (4th Cir 1997)
[4] Impounded (Juvenile I.H.), 120 F 3d 457 (3rd Cir 1997)

prosecution nor shall a hearing be held under section 5037 (disposition after a finding of juvenile delinquency) until any prior juvenile court records of such juvenile have been received by the court, or the clerk of the juvenile court has certified in writing that the juvenile has no prior record, or that the juvenile's record is unavailable and why it is unavailable".

B. Congress amended the law in 1994 to establish the obligation of the Courts to receive the juvenile records before the dispositional hearing.

1. The flexibility addressed by the Puerto Rico District Court in its Opinion and Order (See Appendix 8) and other related cases does not refer to flexibility in filing or not the prior record of the juvenile but to flexibility as to when to file the prior record. (In the 1994 amendment it has to be filed before the section 5037 dispositional hearing, see (d) Citations).

   The Senate Report of section 5032 (Par.10) as it read before the 1994 Amendment says as follows:

   "In many respects, determination of whether a young offender is to be treated as a juvenile or an adult and of the appropriate disposition of juveniles adjudicated delinquent depends on the nature of the juvenile's prior record. Too often, however, juvenile proceedings are undertaken without the benefit of such information. This new paragraph stresses that these records be obtained beforehand whenever possible. The Committee intends,

however, that this new provision's requirements are to be understood in the context of a standard of reasonableness. Thus, if reasonable efforts to obtain a juvenile's records have been made, certification of their unavailability is permissible. Also, the Committee intends that this new requirement be applied with a degree of flexibility so that stages of proceedings to which such records are not relevant are not delayed pending arrival of the records. Thus, it is appropriate that a hearing concerning a transfer for prosecution await the arrival of a juvenile's court records, since they are highly relevant to the transfer decision. However, it would also be appropriate to commence delinquency proceedings (provided the government had not moved for a transfer for prosecution) but stay the subsequent dispositional hearing pending receipt of the records by the court, since such records are relevant to the proper disposition of the offender, but not to the initial delinquency adjudication.[5]"

2. The concern for that flexibility in the interpretation of the law was approached by United States v. MIM, 923 F2d 1016 (1st Cir.) and others circuits with the ever prevailing rule of interpretation of the law:: " When we find the terms of the statute

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[5] See S. Rep. No. 225, 98th Cong., 2d Sess. 391 (1984); Also See United States v Wong, infra (40 Fd 1347, (2nd Cir 1994); United States v NJB, infra (104 F3d 630, (4th Cir 1997) and Impounded (Juvenile I.H.), infra (120 F3d 457, (3rd Cir 1997)

unambiguous judicial inquiry is complete."[6]

3. As of today, the First Circuit still adheres to the classic but prevailing doctrine of interpretation of the law:" To discern what Congress intended, we look primarily to the language and structure of the statute." See United States v. Hilario, 218 F 3d. 23 (1st. Cir. 2000) Plain meaning controls except when the statutory text is ambiguous, or when literal application of the words would either contravene clear legislative intent or lead to an absurd result. Id. (United States v. Commonwealth (No. 01-2124, 1st Cir. 2002).

4. Prior to 1994 section 5032[7] required for the juvenile's prior record to be filed before "any proceedings" could commence against a juvenile, that is, before the information. With the Violent Crime Control and Law Enforcement Act of 1994[8] Congress amended Paragraph Ten of the cited section not to alter the mandate to file the prior records but to extend the timely filling to a later stage: before the disposition hearing. Congress visited the section 10 years after the Courts had extensively interpreted that failure to file the prior juvenile records (or certification of unavailability) was jurisdictional[9]. The law

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[6] at 1019
[7] 18 USC & 5032 (par. 10)
[8] See P.L. 103-32 Act title XIV; & 14002; 108 Stat 2031
[9] United States v. Brian N., 900 F2d 218 (10th Cir. 1990); United States v. Juvenile Male, 923 F2d 614 (8th Cir. 1991);

changed not a word nor a comma regarding the jurisdictional filing of the Paragraph 10 certification which is strong indication that, while the moment to file was modified from before "any proceedings" to before the "disposition hearing", still jurisdiction, as the Courts have upheld, it is a predicate of the filing of the prior juvenile record.

5. The District Court affirms in it's Opinion and Order (See Appendix 9, last par.) that "most federal courts have read the provision to require only good faith efforts by the government to provide the court with documentation of a juvenile prior record citing United States v. Wong 40 F 3d 1347, 1369 (2nd Cir., 1994) The United States v. Wong case, supra, clearly applies to permitting certification of unavailability when reasonable efforts of obtaining them are made. When it refers to flexibility the Court in United States v. Wong is referring to the report (See App A 9), which refers to flexibility as to "what stage of the proceeding are they relevant".

6. All cases cited in United States v. Wong, supra are cases in which the Courts sustained that non-compliance with section 5032 (par. 10) prevents the Court from acquiring jurisdiction.

7. Certainly the United States v. Cuomo, 525 F 2d 1285 (5th Cir. 1976) case cited as

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United States v. Doe, 13 F3d 302 (9th Cir. 1993), United States v. MIM, 923 F2d 1016 (1t Cir. 1999)

authority by the District Court (Appendix 8 at p. 4, last paragraph) to establish that section 5032 requirements have been met by "good faith efforts" is a chronological impossibility since Cuomo, is a 1976 case and the prior juvenile record certification requirement was legislated in 1984. That case refers to a completely different mater: the need certification by the U.S. Attorney General required by Paragraph One of section 5032, not the juvenile prior Court record certification of Paragraph Ten, (which was not even legislated by that date).

8. We find that the First Circuit decision of the present case contradicts it's own long standing decision[10] where the Court categorically established that the prior juvenile record receipt as jurisdictional, which has generally been cited with approval by other Circuits.

9. A majority of the Circuits have upheld the jurisdictional nature of the requirement, only the First Circuit, revoking itself in the present case and probably the Second and Fourth Circuits have drifted towards the "good faith effort " substitution for the language of the law. We submit that this tendency if continued, will sail against the letter and the intention of the law of the juveniles. The law of juveniles has consistently evolved that from informality engendering excessive discretion in Juvenile Courts, to rational and objective

[10] United States v M.I.M., supra

requirements like the mandates for enumerated findings by the Court in section 5032 (Par. 5) and the mandate to obtain the juvenile records or negative certification thereof. Congress has been consistent since 1974 in limiting the trial Courts discretion by establishing thoughtful reasonable conditions and considerations before reaching their findings. As those enumerated in section 5032. (See 137 ALR Fed. 481)

C. Six Circuits have found the letter of the law clear: the prior juvenile record or certification that the juvenile has no prior record, or that the record is unavailable and why is unavailable is a jurisdictional requirement.

1. The 10th Cir., in United States v Brian N., 900 F2d 218 (9th Cir. 1990), held that the language of 18 U.S.C. § 5032 was " clear and unambiguous in its requirement that any prior juvenile court records must be received by the court before a proceeding shall commence against a juvenile."[11] The court of appeals concluded that the filing of the juvenile records or certification of their unavailability was a jurisdictional prerequisite under section 5032.[12]

2. The Eight Circuit, in United States v. Juvenile Male 923 F 2d 614 (8th Cir 1991),

[11] at 221
[12] id at 222-23

following the Brian N. case jurisdiction standard, held that the jurisdictional requisites which included the filling of the juvenile records or its certification, can be met if they are filed by " the appropriate authority."[13]

3. The First Circuit, in United States v M.I.M, 932 F 2d 1016 (1st Cir 1991) stated that paragraph 10 of section 5032 was not ambiguous or in need of clarification.[14] And that the filing of the juvenile records was a prerequisite for juvenile proceedings to commence.

4. The Ninth Circuit, in United States v Doe 13 F 3d 302 (9th Cir 1993) followed Brian N., supra, and Juvenile Male, supra, jurisdictional requirement standard.

5. The Third Circuit, in Impounded Juvenile I.H. 120 F 3d 457 (3rd Cir 1997) held that section 5032 " establishes the procedure to transfer a juvenile ...for criminal prosecution as an adult "[15] and that the language of the statute (Par 10, section 5032)"..could not be clearer. It plainly states that a juvenile 'shall not be transferred' for prosecution as an adult 'until' the juvenile's prior court records are delivered to the district court or until the clerk of the juvenile court has certified in writing that the juvenile has no such

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[13] at 620
[14] at 1019
[15] at 459

record.." [16] The Court of Appeals also added that other Circuits are " in near unanimous agreement that the record certification requirement is a jurisdictional prerequisite in a transfer proceeding. (cases cited)"[17]

6. It held following Brian N., supra, and Juvenile Male, supra, that "the record certification requirement is not met if the government makes absolutely no effort to comply with the record certification requirement, or if the government knows of the existence of **juvenile records** but makes no effort to provide them to the district court." [18] In such cases, the third circuit held that " the district court has no jurisdiction to begin the transfer procedure." [19]

7. The Third Circuit rejected the analysis in the United States v Parker[20] holding that is " was not so compelling as to persuade them to ignore ' the clear language of the statute by labeling it a ' legal technicality'.... the court's later decision in Parker not ' to stand on technicalities' may well have been driven more by frustration at the government's inability or unwillingness to comply with the record certification provision than by a reasoned analysis

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[16] at 460
[17] at 460
[18] at 460-61
[19] at 461
[20] 956 F 2d 169 (8th Cir 1991)

of the statute...Despite the decision in United States v. Parker, we conclude that the language of the statute requires strict and literal compliance with the record certification requirement. Absent some evidence of contrary congressional intent, we must assume that the statute means what it says. A juvenile 'shall not be transferred to adult prosecution . . . until' the district court receives any prior juvenile court records or the clerk of the juvenile court certifies that there are no such records. "[21]

8. The Court of Appeals affirmed that " although it could be argued that the Report's concern for 'reasonableness' and 'flexibility' support the government's position here; ... the context of that language requires a contrary interpretation. The Report simply states that the actual records need not be produced following 'reasonable efforts to find them so long as 'a certification' of their unavailability is tendered. Similarly, the concern for 'flexibility' is addressed, not by relaxing the jurisdictional prerequisite, but by insuring that the records are not required until the appropriate stage of the proceedings... neither the clear

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[21] at 461

language of the statute, nor its legislative history, allows for substantial, good faith, but inadequate compliance with the required record certification."[22]

9. The Seventh Circuit in United States v Jarrett 133 F 3d 519 (7th Cir 1998) stated that that " section 5032 requires the Government to submit the juvenile's court records (or a court clerk's certification of the unavailability or nonexistence of such records) as a jurisdictional prerequisite to a transfer proceeding:" It concluded following Doe's standard that compliance with section 5032's jurisdiction pre-requisite us necessary for federal court jurisdiction to exist."

D. Three Circuits have superseded the language of the law: using a "good faith effort" or "good faith proffer " of filing the juvenile record to be sufficient to grant jurisdiction:

1. The Second Circuit, in United States v Wong, 40 F 3d 1347 (2nd Cir 1994) concluded that " while the language of the record certification provision of § 5032 is amenable to a strict interpretation, most courts have read the records certification provision to require only good faith efforts by the government to provide the court with documentation of a juvenile's prior record (or to the effect that no such record

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[22] at 462

exists or is available.)"[23] The Second Circuit viewed the record certification provision as on that " should be read to afford the government a limited amount of flexibility. Such a reading is especially appropriate in view of the provision's legislative history."[24]

2. In United States v N.J.B., 104 F3d 630 (4th Cir. 1997)[25] the Fourth Circuit stated that the statute, section 5032, "does require that 'any prior juvenile court records' be 'received by the court.'"[26] and that "the statute's legislative history suggests that a good faith effort by a prosecutor should be sufficient"[27] Following the Wong and the Parker case the court of appeals in the case at hand held "most courts have read the records certification provision to require only good faith efforts by the government to provide the court with documentation of a juvenile's prior record." [28]

3. In United States v. MIM, supra the Court of Appeals concluded that "until the Court receives at least a good Faith Proffer of the juvenile records or a Certificate as to their absence or unavailability, no proceedings may begin against the juvenile."[29] Now we

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[23] at 1369
[24] at 1369
[27] at 636
[26] at 636
[27] at 636
[28] at 636
[29] at 923 F2d 1016, 1019

are to count the present decision as contradicting the prior.

E. Four Circuits have not addressed the question. The Supreme Court should address the issue to avoid chance or ballot to say what the law is.

1. The remaining Circuits that is, the Federal, District of Columbia, and the, as well as the Supreme Court have not expressed themselves regarding this matter. The importance of juvenile delinquency and the positive judicial action essential to curb its growth and causes has not diminished but increased consistently in last decades. The importance of considering prior juvenile records and to make enumerated findings before a juvenile is transferred to adult jurisdiction are mandates of the Congress (established by section 5032) directed to individualize and give a rational and informed basis for that crossroads decision: to deal with the juvenile with the available resources or to send him away to the adult jurisdiction where the juvenile has to cope with a different reality and a substantial different probability of rehabilitation.

2. Pressure by the government to "simplify" procedure by the relaxation of the requirements of the law must not let the Court wash away the well thought requisites of the law buy subterfuges like "good faith efforts". It is highly suspicious why the government invokes this "good faith efforts" and other invitations to part

with the law, while Congress considered the way dispel any doubts regarding the availability of the juvenile record: a certification of their unavailability and reason thereof. Is that simple certification such a burden that the government must hide behind after the fact excuses while a fundamental judicial determination about the juvenile is washed away by ex post facto reconstruction of the law which helps burocratic inefficiency but not justice and the clear mandate of the law.

X. CONCLUSION

Policy affecting juveniles is by itself of the utmost importance in the application of law and the general welfare of society. Congress has developed an approach that limits judicial discretion and requires courts to make specific findings and the consideration, among others, of prior criminal record of the juvenile. Circuit Courts have approached the matter in a manner, which is conflicting among them, and in some cases against the clear letter of the law regarding the jurisdiction of District Courts. A consistent interpretation of the law is necessary for a uniform and fair treatment of concerned juveniles.

WHEREFORE, appearing attorney for defendant petitioner respectfully requests from the Honorable Court that a Writ of Certiorari be granted and the Judgment entered by the Puerto Rico District Court vacated.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico on this 1st. of July 2002.

JOHN WARD-LLAMBIAS, ESQ.
Attorney for Petitioner

APPENDIX

Appendix #1

IN THE UNITED STATES DISTRICT COURT
FOR THE JUDICIAL DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
Plaintiff Crim. Case No. 1-96 (PG)

V.

MARCOS CARRASQUILLO ET. AL.
Defendant

MOTION TO SET ASIDE JUDGMENT UNDER 28 USC 2255

ENTERS DEFENDANT MARCOS CARRASQUILLO-GOMEZ, through his undersigned attorney and says and requests:

1. Judgment hereby attacked is United States v. Marcos Carrasquillo Gómez Criminal Case No. 96-1, United States District Court For The Judicial District of Puerto Rico, J. Pérez-Giménez, Judge.
2. Sentence was imposed on August 6, 1998.
3. Terms of Sentence were: Imprisonment for 292 months as to Count. 1 of the Indictment and 60 months a to Count 2, to be served consecutively with each other. Supervised release for 5 years as to Count. 1 and 3 years as to Count. 2, to be served concurrently. Monetary Assessment of $100.00 and restitution to Banco Popular de PR for 1/5 of whatever the ultimate amount is finally determined to be the loss of the bank.
4. Counts were under 18 USC 2113 A.F; 2113(d);

2113(e); Count 1: BANK ROBBERY; count. 2: ROBBERY BY FORCE OR VIOLENCE.

5. A change of plea hearing was held on March 26, 1998 where Plea of Not Guilty is withdrawn and Plea of Guilty entered as to Counts 1 and 2 of the Indictment.

6. Notice of Appeal was filed by Marcos Carrasquillo-Gómez (5) on August 10, 1998 as to all counts, before the United States Court of Appeals for the First Circuit. Case Number: 98-2083. Appellate procedures are still pending.

7. Codefendant was convicted by plea of guilty, which was unlawfully induced and/or not made voluntarily and/or without understanding of the nature of the charge and the consequences of the plea.

8. Codefendant's mental capacity to understand the plea alternatives was insufficient and no opportunity to ascertain such capacity was provided.

9. Due to lack of effective assistance of counsel, issue of mental capacity for adequate and intelligent plea purposes was improperly omitted and not raised at the plea of guilty procedures.

10. The following attorneys represented codefendant at different stages of the procedures: (a) Julio Morales from the initial proceedings until August 21, 1996 when requested by client to Withdraw as Attorney; (b) Attorney Ricardo L. Rodríguez-Padilla, from September 26, 1996 to October 211997 and (c) Attorney Lydia Lizarríbar-Buxó, from October 1997 to the termination of the case and the present appeal procedures.

11. Codefendant was subjected, while in custody, to psychological and/or psychiatric examinations that support the conclusion that he was not competent to intelligently enter a plea of guilty, a circumstance that in conjunction to his legal representation's ineffective explanations as to plea negotiations and trial rights and alternatives as well as Sentencing considerations rendered unfair and illegal any change of plea so induced. His rights to remain silent and not to incriminate him self were not properly provided for by his legal representation. The Court was not moved to determine the issue of mental competency nor aware of the lack of adequate representation, so the issue is a proper one under sec. 2255.

> "Under the express terms of section *2255,* a motion there under may be denied without a hearing only if the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. As stated above, the district court so concluded with regard to both grounds for relief urged in the section 2255 motion. BREWSTER, v. UNITED STATES 437 F.2d 917 (United States Court of Appeals, Ninth Circuit 1970)

12. The combination of lack of effective representation as to plea conversations and adequate protection of his legal rights during such conversations added to the fact of diminished competency to understand the implications and nature of the plea alternatives, render the change of plea and, therefore the conviction illegal:

13. A combination of factors out of the control of Mr. Carrasquillo-Gómez rendered his change of plea subject to collateral attack: there was objective basis for the issue of mental competency to plea as revealed by professional examinations prior to his change of plea, and also, his legal representation did not properly provide the rational basis for the intelligent adoption or rejection of a plea of guilty. Absent a determination under proper circumstances of such factors, a 2255 procedure is in order:

> 'At most, only a finding made following such notice and bean jig would bind the accused and be immune from collateral attack.'
>
> In this regard it is immaterial that, before accepting the pleas, Brewster was offered an opportunity to produce evidence but had none to offer. See Floyd v. United States, 368 F.2d 368, 377 (5th Cir. 1966). **BREWSTER,** supra. p

14. No matter how careful or detailed was the presiding Judge in the change of plea hearing in ascertaining the intelligent and informed state of mind of the defendant was, it is still insufficient to establish the competency questions as compared to a competency hearing when one is properly requested:

> [5] The district court may have thought Brewster is not entitled to an evidentiary hearing on the competency question in this collateral proceeding because the same judge before whom this proceeding was brought observed

and talked with Brewster at the time the pleas Were received. However, the district judge's observation of a petitioner at a prior trial or plea proceeding is not an adequate ground for denying a hearing on his section 2255 motion raising the issue of competency. See Sanders v. United States, 373 U.S. 1,20, 83 S.Ct. 1068, 10 1,.Ed.2d 148 (11963) 93 S.Ct. 1461 36 L.Ed.2d 169437 F. 2d 917 BREWSTER, supra.

15. The defendant accepted to change this plea, waive all his rights including his right to a fair trial and submit himself to a term of Sentence of 30 years under the representations and pressures of his attorney and while his competency to intelligently choose the most reasonable alternatives was, at least, diminished:

> It is elementary that a coerced plea is open to collateral attack. Machibroda v. United States, supra, at 493, 82 S.Ct., at 513. See also Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 LEd. 1302; Walker v. Johnston, 312 U.S. *275,* 61 S.Ct. 574, 85 LEd. 830; Diamond v. United States, 9 Cir., 432 F:2d *35,* 39; Crow v. United States, 10 Cir., 397 F.2d 284, 285-286. It is equally clear that s 2255 calls for a hearing on such allegations unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. **FONTAINE v. UNITED STATES: 411 U.S. 213, 93 S.Ct. 1461**

16. The defendant is entitled to the opportunity to show that the Sentence imposed should be vacated and to present evidence as to his mental competency and the effect of ineffective legal representation upon his conviction by plea of guilty.

> [4] On this record, we cannot conclude with the assurance required by the statutory standard 'conclusively show' that under no circumstances could the petitioner establish facts warranting relief under s *2255;* accordingly, we vacate the judgment of the Court of Appeals and remand to that court to the end that the petitioner be afforded a hearing on his petition in the District Court **FONTAINE,** supra, p. 1463.

17. With regards to the determination of competency to plea, we understand (a) observations and careful questioning by the Judge will not cure or substitute the mental competency deterioration, (b) that it is not required to show that defendant is not mentally competent, but only that his relative condition of diminished or impaired competency, added to other relevant factors such as inadequate legal representation will sustain, in the context of a 2255 hearing, that the plea of guilty has to be set aside and the Sentence vacated.

> [20] As to the first ground, it has been frequently held that the Trial Court's observation of the defendant

at trial cannot be the basis for denying *a* hearing on a § *2255* motion raising the issue of competency. See e.g., Sanders v. United States, 1963, 373 U.S. I, 20, 83 S.Ct. 1068, 1079, 10 L.Ed. 148, 164; Sanders v. United States, 5 Cir., 1953, *205* F.2d 399, 401; Bostic v. United States, supra, 298 F.2d at 680; Taylor v. United States, supra,282 F.2d at 22; of Machibroda v. United States, 1962, 368 U.S. 487, 495, 82 S.Ct. 510, *514*, 7 L.Ed.2d 473, 479. In a different but relevant context, the Supreme Court recently held that a defendant's mental alertness and understanding displayed in* * * 'colloquies' with the trial judge * * * offers no justification for ignoring the uncontradicted testimony of * * * (his) history of pronounced Irrational behavior. While * * * (his) demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.

Pate V. Robinson, 1966, 383 U.S. 375, *385*, 86 S.Ct. 836, 842, (5 L.Ed.2d 815, 822.

[21][22] As to the second ground, the Trial Court's reliance on the § 4244 report we conclude that the Court erred in holding that the report conclusively showed that Appellant was entitled to no relief. In so concluding, we view the

psychiatric report as if it were presented for the first time in the § 2255 proceeding, for the mere fact that It was before the trial court ex parte at the time of trial does not require that, in the subsequent collateral proceeding, it be read as conclusively showing competence. [FN 171 Although it stands as the ex parte expression of a single psychiatrist that Appellant was competent to stand trial, on its face it shows that just four months prior to the trial Appellant had been suffering from a serious mental condition Which - competent psychiatrists thought was 'unimproved.' This is almost the situation we confronted in Van De Bogart. **BRYANT v. UNITED STATES 468 F.2d 812** (United States Court of Appeals, Eighth Circuit. 1972).

18. In sum, codefendant Marcos Rodriguez-Gomez was Sentenced based on a conviction by plea of guilty while he was not capable of understanding the implications of his plea, nor did his legal representation assist him in securing a fair and intelligent alternative to plea or the appropriate use of his rights to fair trail, and non-incrimination, among others and due process including his Sixth amendment right to adequate legal representation. This being the case, section 2255 is the appropriate, procedure to ascertain the facts to establish whether the present Sentence must be set aside as a matter of law.

WHEREFORE, codefendant respectfully ask from the Court that the present motion under section 2255 be granted amid adequate opportunity be provided to examine all attorneys who represented him in the concerned procedures, examine and obtain copies off all documents related to the present case, unsealing those that may be relevant to the present procedure, and all records or persons regarding the issue of mental capacity of Mr. Marcos Carrasquillo- Gomez for plea purposes as well as other evidence which may assist the Court in reaching a fair and well founded determination.

RESPECTFULLY SUBMITTED.

At San Juan, Puerto Rico this 16th of April 1999.

CERTIFY: That a true copy of this motion has been notified to the U.S. Attorney at his address of record.

s/ JOHN WARD-LLAMBIAS, ESQ.
USCA- 201013
BOX 6221, LOÍZA STATION
SAN JUAN, P.R. 00914
TEL. (787) 721-7080

Appendix #2

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IN THE UNITED STATES DISTRICT COURT
FOR THE JUDICIAL DISTRICT OF PUERTO RICO

MARCOS CARRASQUILLO GÓMEZ,	*
Petitioner,	*
	* Criminal No.
v.	* 99-1462 (PG)
	* Re:Criminal
	* No.96-01(PG)
UNITED STATES OF AMERICA	*
Respondent	*

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE JUDGMENT PURSUANT TO SECTION 2255

TO THE HONORABLE COURT:

COMES NOW the United States of America, by and through the undersigned counsel, and very respectfully prays and alleges as follows:

Introduction

Petitioner Marcos Carrasquillo Gomez (hereinafter "Carrasquillo Gomez"), filed a motion under Section *2255* following his conviction for bank robbery pursuant to a plea of guilty. Defendant essentially alleges that he lacked the necessary mental capacity to understand the consequences of his plea. of guilty, and furthermore, that his counsel at the time was ineffective in that she failed to raise the issue of mental competency before the district court.

Defendant further asserts that his counsel was

ineffective in that she failed to explain to defendant a) the plea negotiations and its consequences; b) his trial rights; c) the sentencing consequences of a guilty plea; and d) his right to remain silent and not incriminate himself. The United States submits that defendant's motion lacks merits on all contentions.

Factual Background

Carrasquillo Gomez, a juvenile defendant at the time, was arrested on December 5,1995, pursuant to a complaint charging him with violations of 18 USC § 21 13(a)(d)(e) - armed bank robbery during which a guard employed by the bank was killed by the assailants; and 18 USC § 924(c)(I)(3) - carrying and using firearms during the commission of said crime of violence. On January 4,1996, an information was filed against this juvenile defendant charging him with the same violations charged in the complaint.

The evidence against Carrasquillo Gómez included an eyewitness of the bank robbery who identified him as one of the participants~ In addition, a latent fingerprint and a pair of working gloves belonging to Carrasquillo Gomez (the gloves had his name written on it and it was verified that he had recently acquired a construction job), were found inside the getaway vehicle. Moreover, Carrasquillo Gomez was arrested while attempting to leave Puerto Rico.

Following his detention and the reading of his Miranda warnings Carrasquillo Gómez stated that he was going to New York to find a job. He also stated that he purchased his ticket with his uncle Osvaldo Gómez. According to Carrasquillo-Gómez, his cousin, Vanessa Carrasquillo, was supposed to pick him up, but he had no number for her to be contacted. Carrasquillo-Gómez had $5,950.00 in cash on his person at the time of his detention.

Carrasquillo Gomez's mother had no knowledge

of her son moving to New York, Following his arrest and appointment of counsel, Carrasquillo Gomez, in the presence of his mother (an INS inspector) and with her consent, provided a profer to the United States summarizing all the details of the bank robbery in an effort to obtain a plea and cooperation agreement.

Subsequent to the filing of the information Carrasquillo Gomez was transferred to adult status~ During the transfer hearing, the defense was granted the opportunity to present evidence as to Carrasquillo Gomez' age and social background; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's intellectual development and psychological maturity; the nature and success of past treatment efforts; and the availability of programs to treat the juvenile's behavioral problems. These are the factors, which the district court is required to consider under 18 U.S.C. § 5032. in reaching its decision to transfer the petitioner to adult status.

The evidence presented as to Carrasquillo Gomez' intellectual and psychological development, through an psychological examination conducted of him, showed that Petitioner was in fact competent to stand trial. Said evaluation further indicated that Carrasquillo Gómez understood his actions as well as the consequences of the same. It was the opinion of the examiner that Petitioner understood the situation he was in and could confer effectively with counsel and assist in his defense.

Following his transfer to adult status Carrasquillo Gomez continued cooperating with the government. Said cooperation stopped when the Petitioner, while being prepared to testify at trial, decided he would not take the stand against his co-defendants. The consequences of this action were explained thoroughly to Carrasquillo Gomez on at least three

different occasions by the undersigned. The petitioner understood that he would not receive a recommendation for a downward departure, he understood the applicable sentencing guidelines and respective sentence to be imposed according to a plea agreement without cooperation, he understood the sentence to be imposed if he proceeded to trial and was found guilty, and he understood that if he elected to proceed to trial and was acquitted he would be set free.

Notwithstanding the offer of the government to cooperate in exchange for leniency at sentence, Petitioner elected to enter a plea of guilty pursuant to a plea agreement. As part of that plea agreement Petitioner was again made aware of all his legal rights including the right to trial, the right to testify or not in his own behalf and the right not to incriminate himself, These rights were explained to Petitioner again by the district court.

Argument

A. Mental Competence

Petitioner asserts that he lacks the mental competency to understand the consequences of his plea of guilty, yet submits no evidence to support his allegation. On the contrary, the only evidence in the record regarding the mental condition of the Petitioner, the psychological examination conducted of Petitioner, shows that he was competent and suffered from no condition or illness which could affect his understanding of the proceedings or their consequences. It must be underscored that the district court had an opportunity to hear and evaluate this evidence at the transfer hearing of Petitioner, therefore, the issue of the Petitioner's mental competence was in fact presented to the Court.

Moreover, the undersigned interviewed the

Petitioner on at least three occasions with the purpose of preparing for trial and at no time did the undersigned perceive that Petitioner was not understanding what was happening. In fact, it was Petitioner himself who upon evaluating the consequences of his taking the witness stand at trial against his co-defendants decided not to continue cooperating with the United States.

The United States Supreme Court has stated that the Petitioner is entitled to an evidentiary hearing only if it is not clear from the record and the files of the case that Petitioner is not entitled to any relief. Sanders v. United States, 373 U.S. 1, 3-4 (1963). Here, it is clear that Petitioner is not entitle to any relief, therefore, Petitioner's request for an evidentiary hearing should be denied.

B. Notification of Legal Rights

Defendant further asserts that his counsel was ineffective in that she failed to explain to defendant a) the plea negotiations and its consequences; b) his trial rights; c) the sentencing consequences of a guilty plea; and d) his right to remain silent and not incriminate himself.

Clearly the United States cannot state whether or not Petitioner's counsel discussed the above-recited legal rights with him. However, we can represent to the Court that the undersigned discussed with Petitioner on numerous occasions the options which he had to plead guilty either through a plea agreement or a plea and cooperation agreement and their respective consequences. These discussions included Petitioner's right to remain silent and not incriminate himself, his right to proceed to trial as well as the possible sentencing scenarios. Moreover, the undersigned held numerous meetings with all three counsel who represented Petitioner and discussed the facts of his case at length, as well as

his options to plea guilty, plea guilty and cooperate or proceed to trial and the respective sentencing consequences of each option.

As stated above the district court again reviewed the legal rights of Petitioner with him at the change of plea hearing. In light of the above, the United States submits that defendant's motion lacks merits on all contentions.

WHEREFORE the United States respectfully submits that Petitioner's Motion to Vacate Conviction pursuant to Section 2255 should be summarily **denied**.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 15th day of July 1999.

GUILLERMO GIL
United States Attorney

s/ Jacabed Rodriguez-Coss
Assistant US Attorney
Federal Bldg., Room 452
Carlos Chardon Ave.
Hato Rey, PR 00918

CERTIFICATE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing has been mailed via regular mail to: John Ward Llambias, Esq., Box 6221, Loiza Station, San Juan, Puerto Rico 009 14; and Lydia Lizarribar Masini, Esq., 14 O'Neill St., Suite A, Hato Rey, Puerto Rico 00918.

s/ Jacabed Rodriguez-Coss

Appendix #3

[Seal not legible]

IN THE UNITED STATES DISTRICT COURT
FOR THE JUDICIAL DISTRICT OF PUERTO RICO

MARCOS CARRASQUILLO GÓMEZ,	*
Petitioner,	*
	* Criminal No.
v.	* 99-1462 (PG)
	* Re:Criminal
	* No.96-01(PG)
UNITED STATES OF AMERICA	*
Respondent	*

ORDER

Petitioner's 2255 motion, filed on April 24, 1999, is hereby referred to a U.S. Magistrate Judge for his/her consideration and resolution.

IT IS SO ORDERED.

San Juan, Puerto Rico, May 13, 1999.

s/ Juan M. Pérez-Giménez
U. S. District Judge

Appendix #4

Seal :
[Received & file
3/31/00
Office Clerk US.
DST. CT.
San Juan, PR]

Seal :
[Entred on Docket
4/7/00 Pursuant
To FRCP Rules 58 & 79a]

IN THE UNITED STATES DISTRICT COURT
FOR THE JUDICIAL DISTRICT OF PUERTO RICO

MARCOS CARRASQUILLO GÓMEZ,	*
Petitioner,	*
	* Criminal No.
v.	* 99-1462 (PG)
	* Re:Criminal
	* No.96-01(PG)
UNITED STATES OF AMERICA	*
Respondent	*

MAGISTRATE-JUDGE'S REPORT AND RECOMMENDATION

On April27, 1999, petitioner Marcos Carrasquillo-Gdmez (hereinafter "Carrasquffio") filed a motion to vacate sentence under 28 U.S.C. § *2255* **(Docket No. 1).** Carrasquillo alleges that: (1) his guilty plea was invalid because he was incompetent or otherwise mentally impaired at the time he pleaded; (2) the plea was involuntary because of his diminished mental capacity, and because he was not properly advised of the consequences of his guilty plea; and (3) his conviction and sentence were obtained in violation of

the constitutional guarantee of effective assistance of counsel (Docket No. 1).

For the reasons set forth below, this Magistrate-Judge RECOMMENDS that the petition be **DENIED.**

I.FACTUAL AND PROCEDURAL BACKGROUND

The evidence on record reflects that in early November 1995, Carrasquillo and his friend Hugo Sanchez (hereinafter "Sanchez") were shopping at Plaza Carolina Shopping Mall, when they observed two private security officers walking toward an armored car carrying money bags (Docket No. 5, Exh. 12, p. 1). The two friends noted the time (9:40 a.m.) and day (Monday) of this delivery and discussed the possibility of a future robbery. The following Monday, Carrasquillo and Sanchez went back to the Mall, where they saw the armored car again. One week later, at the same time and place, the armored car was observed for a *third time.* Thereafter, *Carrasquillo* and Sanchez finalized their plans to rob the armored car and recruited four other friends to assist them in the robbery (Docket No. 5, Ex. 12. p. 2).

On December 5, 1995, at 9:45 a-rn., an armored truck arrived at the Banco Popular branch office located in Plaza Carolina (Docket No. 5, Exh. 15, p. 3). Two security officers exited the vehicle and proceeded to the bank to collect the night deposits. Upon exiting the bank, the security officers were confronted and fired upon by the assailants. One of the two security officers was killed by this gunfire and the other wounded. The robbers made off with more than $220,000.00 (Docket No. 5, Exh. 15, p. 5).

With the exception of Carrasquillo, all of the robbers attempted to flee the area in a getaway car (Docket No. 5, Exh. 12, p. 4). Carrasquillo went inside the mall and attempted to blend in with the

shoppers. *After* the commotion *died* down outside, Carrasquillo walked out of the mall, got on a public bus, and left the area. Carrasquillo was apprehended the following day at the John F. Kennedy International Airport in New York (Criminal Case No. 96-0001 (PG), Docket No. I). Following his apprehension, Carrasquillo spoke with an F. B. I. agent and. provided a detailed confession of his participation in the offense charged and that of his co-defendants (Docket No. 5. Exh. 12).

Carrasquilo was charged and initially processed as a juvenile. His initial appearance took place on December 18, 1995 (Criminal Case No. 96-001(PG), Docket No. 2). The record reflects that plaintiff was represented by counsel on that date, and at all times thereafter[1] (Criminal Case No. 96-001(PG)).

On January 4, 1996, Carrasquillo was charged by means of an Information with one count of bank robbery, pursuant to 18 U.S.C. §§2113 (a), (d), (e), and one count of using a firearm during a crime of violence, pursuant to 18 U.S.C. *§924(c)* (Criminal Case No. 96-001(PG), Docket No. 15)[2] Because

---

[1] Carrasquillo was initially represented by attorney Julio Morales (Criminal No. 96-001 (PG)Docket No. 1, p. 2). On August 22, 1996, the Court granted Carrasquillo's motion for Morales to withdraw (Criminal No. 96-001(PG), Docket No. 142). Carrasquillo was them represented by attorney Ricardo L. Rodriguez (Criminal No. 96.-001 (PG), Docket No. 1, p. 2). However, on August 22, 1997, Carrasquillo moved for Rodriguez to withdraw, and this motion was granted by the Court (Criminal No. 96-001 (PO), Docket No. 302. Thereafter, until the conclusion of these proceedings, plaintiff was represented by attorney Lydia Lizarribar-Masini (Criminal No. 96-001(PO), Docket No. 318).

[2] A superseding indictment containing the same charges was returned by a grand jury on March 27, 1996 (Criminal No. 96-001(PG), Docket No. 50). The record reflects that prior to this Carrasquillo had been transferred from juvenile to adult status

Carrasquillo was 17 years old at the time of the crime, the prosecution also filed a motion to transfer him to adult status (Criminal Case No. 96-001(PG), Docket No. 17). On February 1, 1996, in order to determine Carrasquillo's intellectual development and psychological maturity[3] the District Court ordered that Dr. Luis Umpierre conduct a psychological evaluation of the juvenile (Criminal Case No. 96-001(PG), Docket No. 22).

In February of 1996, Dr. Umpierre, a clinical psychologist, submitted his psycliodiagnostic assessment (Docket No. *5,* Ext. *.5).* This evaluation reflected that Dr. Umpierre had met *with* Carrasquillo on two different occasions, had conducted a thorough interview of Carrasquillo, and had administered several different psychological tests *(Id.).* The evaluation reflects that Carrasquillo reported to Dr. Umpierre that he had "[n]o history of psychological or psychiatric treatment (Docket No. 5, Ext. 5, p. 4). With regard to Carrasquilo's present psychological condition, Dr. Umpierre found that Carrasquillo was suffering from feelings of sadness and depression related to his legal situation (Docket No. 5, Ext. 5, p. 6), but that he did not "manifest any indication of a deep psychological disturbance of a disintegrative nature" (Docket No. *5,* Ext. *5,* p, 9). With regard to Carrasquillo's competency, Dr. Umpierre stated as follows:

Mr. Carrasquillo was able to relate the

(Criminal No. 96-001(PG), Docket No. 38)

[3] ' By law, these factors must be considered by the District Court in determining whether to transfer a juvenile to adult court. 18 U.S.C. § 5032.

situation for which he is being accused. "I am being charged with murder[4], assault and illegal use of firearms; also they will decide to see me as a juvenile or as an adult. He was able to explain what will be the consequence of this.

The Competency screening test and the Competency Assessment Instrument were administered to Mr. Carrasquillo. On both tests he showed an appropriate ability to cooperate in his own defense, to communicate and to relate. He showed a[n] adequate understanding and awareness of the consequences and peril of the situation. He has limited appraisal of the judge, jury, prosecuting attorneys and witness roles.

From the psychological perspective he has appropriate ability to relate and express self-protective attitude. He has appreciation of his personal involvement in the legal system, attends to sequence of court events and maintains a realistic assessment of his need for legal representation. He understands the nature of the adversary process but needs further clarification in some areas.

(Docket No. 5, Ext. 5, pp. 5-6). On March 8, 1996, the trial court ordered that Carrasquillo be transferred to adult status (Criminal Case No. 96-001(PG), Docket No. 38).

On March 26, 1998, the parties entered into a

[4] Although Carrasquillo was not charged with murder, he was charged with bank robbery resulting in death, under 18 U.S.C. §2113(e). This provision carries a mandatory sentence of either life imprisonment, or death.

written plea agreement[5] (Docket No. 5, Exh. 14). This plea *agreement*, in relevant part, listed the elements of each charge in the indictment and provided that Carrasquilo would plead guilty to both charges (Docket No. 5, Exh. 14, p. 1). As to Count one, the plea agreement provided that any reference ton § 2113(e) would be stricken[6] and that the prosecution would recommend a sentence of 292 months (Pocket No. 5, Ext. 14. p. 4). In addition, as to Count two, The government was to recommend and Carrasquillo was to receive a consecutive 60-month sentence[7] (Docket No. 5, Ext. 14, p. 3). Through the written plea agreement Carrasquillo was advised that, by pleading guilty, he was giving up his right to a jury trial, which included his right against self-incrimination (Docket No.5, Ext. 14, pp. 6-7). Carrasquillo signed and acknowledged as such the contents of the plea agreement (Docket No. 5, Ext 14, p. 9). In addition, Carrasquillo signed the plea agreement a second time, indicating that he had "reviewed every part of it with (his) attorney," that he fully understood the agreement, and that he was voluntarily agreeing to it (Docket No. 5, Ext. 14, p.

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[5] Initially, the defendant had entered into a plea and cooperation agreement. Based upon the same, defendant was debriefed on several occasions by the prosecutor and law enforcement agents. However, when asked to testify against his co-defendants at trial, defendant Carrasquillo refused to do so and re-negotiated the terms and conditions of his plea agreement.

[6] This was a significant concession on the part of the government, as it reduced Carrasquillo's sentencing exposure significantly. Under 18 U.S.C. § 2113(e), a sentence of life imprisonment, or death, is mandatory. In contrast, under 18 U.S.C. § 2113(d), defendant's maximum sentencing exposure was 25 years in prison.

[7] With regard to Count two, there was a mandatory five-year prison sentence, that had to be served consecutively to any other sentence. See 18 U.S.C. § 924(c); 18 U5.C.S. Appx. § 2K2.4.

10).

The written plea agreement also contained the following notation, signed by attorney Lydia Lizarribar-Masirli:

> I am the attorney for Marcos Carrasquillo Gomez. I have fully explained to the defendant the defendant's rights with respect to the pending indictment. Further, I have reviewed the provisions of the Sentencing Guidelines, Policy Statements, Application, and Background Notes, and I have fully explained to the defendant the provisions of those guidelines, which may apply in this case. I have carefully reviewed every part of this Plea Agreement with the defendant. To my knowledge, the defendant is entering into this agreement voluntarily, intelligently and with full knowledge of all the consequences of his plea of guilty (Docket No. 5, Ext. 14, p. 10).

After Carrasquillo signed the plea agreement, he entered his plea in open court. Prior to entry of the plea, the trial court explained to Carrasquillo that he was pleading to Count one, a bank robbery charge, and Count two, where he was being charged for the illegal use and possession of a weapon in relation to a crime of violence (Criminal Case No. 96-001(PG), Docket No. 474, p. 4). The Court further informed Carrasquillo that, by pleading guilty, he was giving up his right to a jury trial (Criminal Case No. 96-001 (PG), Docket No. 474, pp. 5-7). The right to a jury trial, the Judge explained, included the right against self-incrimination, which meant that Carrasquillo was entitled "not to make any statements, give any statements, or make any admissions as to the essential elements of the offense" (Criminal Case No. 96-001(PG Docket No. 474, p. 7). With regard to the

possible sentence, the trial court explained that the plea agreement called for the deletion of any reference to 18 *U.S.C.§* 2113(e), which meant that "the maximum punishment provided in *count* one will no longer be life imprisonment but it [will] be twenty-five years" (Criminal Case No. 96-001(PG), Docket No. 474, pp. 12-13). The trial court also explained to Carrasquillo that the mandatory sentence as to Count two was five years in prison, to run consecutively to the sentence imposed in Count one (Criminal Case No. 96-001(PG), Docket No. 474, pp. 8, 13). Carrasquillo indicated that he understood each one of these advisements. He also acknowledged that, by signing the plea agreement, he was "representing to the Court that [he was] satisfied with the services of [his] attorney, Miss Lizarríbar-Masini and [he was] acknowledg [ing] that she ha [d] rendered effective assistance" (Criminal Case No. 96-001(PG), Docket No. 474, p. 15). At the conclusion of the change of plea hearing, the prosecutor recounted the details of the crime, and Carrasquillo acknowledged his involvement in the offenses charged (Criminal Case No. 96-001(PG), Docket No. 474, pp. 18-20).

In July of 1998, a presentence investigation and report (hereinafter "PSI") was prepared by a federal probation officer (Docket No. 5, Exh. 15). The only reference to plaintiff's psychological condition is contained on page 13 of the report, where the probation officer noted that "the defendant expressed being depressed due to his legal predicament" (Docket No. 5, Exh. 15, p. 13).

On August 6, 1998. Carrasquillo received a sentence of 292 months, or 24 years and 4 months, on Count one (Docket No. 1, p. 1). On Count 2, Carrasquillo received a consecutive 60-month sentence (Docket No. 1, p. 1).

II. Conclusions of Law

A. Legal Standard

A federal prisoner may claim "the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . ."28 U.S.C. § 2255. However, such a petition may be summarily denied where it contains mere bald assertions without specific factual allegations *Barrett v. United States*, 965 F, 2d 1184, 1186 (1st Cir. 1992). In addition, even a facially adequate petition may be denied without a hearing where the alleged facts are conclusively refuted by the files and records of the case. *Id.; accord, Lema v. United States*. 987 F.2d 48, *5* 1-52 (1st. Cir. 1993).

B. Petitioner's Claims

1. Competency to Stand Trial

Carrasquillo maintains that, at the time of his guilty plea, he suffered from "diminished competency to understand the implications and nature of the plea alternatives" (Docket No. 1, p. 3). He contends that the record contains psychological examinations that "support the conclusion that he was not competent" (Docket No. 1, p. 2). We reject Carrasquillo's claim that he was not competent at the time of his plea as one being completely contradicted by the record.

The constitutional guarantee of due process requires that the trial of an accused be conducted only when he is mentally competent. *See Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Medina v. California*, *505* U.S. 437, *453* (1992). This principle is equally true with regard to a plea of guilty. *See Godinez v. Moran*, *509* U.S. 389, 400 (1993). In order to be competent, the accused must possess: (I) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; and (2) a rational as well as factual understanding of the

proceedings against him. *Id.* at 396. However, a habeas petitioner challenging his guilty plea on the grounds of incompetence is entitled to a *nunc pro tunc* evidentiary hearing only upon raising a threshold doubt about his competency by clear and convincing evidence.[8] Barnett v. Hargets, 174 F.3d 1128, 1133 (10"' Cir, 1999); Lokos v. Capps, 625 lt2d 1258, 1261 (9 Cir. 1980).

Here, in his § 2255 petition, Carrasquillo implies that the report of Dr. Umpierre contained a finding of incompetency.[9] However, in reality Dr. Umpierre's report reaches the opposite conclusion. As noted above, this clinical psychologist administered two different competency tests to Carrasquillo and concluded that Carrasquillo "was able to relate the situation for which he is being accused" (Pocket No. 5, Exh. 5, pp. 5-6). In addition, Dr. Umpierre concluded that "[o]n both tests he [Carrasquillo] showed an appropriate ability to cooperate in his own defense, to communicate and to relate" (Docket No. 5, Exh. 5, pp. 5-6). Thus, Dr. Umpierre's report indicated that, under the two-part test delineated in Gomez v. Moran, *supra*, Carrasquillo was competent to enter a plea of guilty.

The record further reflects that while pending trial defense counsel kept in close communication

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[8] This is a substantive due process right. An accused also has a procedural due process right to a competency determination during trial whenever the evidence presented at trial raises a bona fide doubt as to his competency. Patty. Robinson, 383 U.S. 375 (1966); Careter v. Johnson, 131 F.3d 452, 459 n. 10 5th Cit. 1997) However, Carrasquillo does nor raise, nor does the record support, a claim that evidence of incompetence was presented to the trial court at the time of his plea.

[9] Carrasquillo does not directly refer to this report, nor any other, in his post-conviction motion. This Court Is unaware of any psychological report pertaining to his criminal case other than that of Dr. Umpierre.

with defendant and his relatives. At no time was counsel ever informed of any prior mental condition or treatment that defendant could have received. At all meetings with counsel, defendant appeared alert, coherent and well oriented in time and space. He further chose to request change of counsel whenever not satisfied with counsel's performance, which denotes Carrasquillo's clear understanding of his rights and trial proceedings (Docket No. 5). The same observations and conclusions were made by the attorney for the government, who, pursuant to the cooperation agreement in which defendant had entered, had ample opportunity to communicate with defendant and assess his mental state (Docket No. 6).

Carrasquillo's motion fails to state any reason why this Court should not credit the conclusion of Dr. Umpierre. In addition, Carrasquillo's motion fails to specify what evidence, other than Dr. Umpierre's report, would support his claim of incompetency to plead guilty. Under these circumstances, no hearing is required on Carrasquillo's claim, and it is recommended that the same be summarily denied.

2. Voluntariness of Petitioner's Guilty Plea

Carrasquillo maintains that his plea was involuntary because of his diminished mental capacity, and because he was not properly advised of the consequences of his guilty plea (Docket No. 1, pp. 2-3). We have already discussed and disposed of Carrasquillo's claim of incompetency. With regard to his claim of improper advisement, Carrasquillo maintains that he was not properly informed of his trial rights, including his right to remain silent (Docket No. 1, p. 2). In addition, he alleges that he was not adequately advised of the nature of the charges to which he pled, or the sentencing consequences of his plea (Docket No. 1, p. 2). We disagree.

If a defendant's guilty plea has not been entered voluntarily, it has been obtained in violation of due process and is, therefore, void. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *United States v. McDonald*, 121 F.3d 7, 10 (1" Cir. 1997). In order to satisfy the due process guarantee, a guilty plea must be entered "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742,748 (1970); *United States v. Noriega-Millan*, 110 F.3d 162, 166 (1sf Cir.A997). In order to facilitate the entry of voluntary guilty pleas, Federal Rule of Criminal Procedure 11(c), in relevant part, requires district courts to proceed in the following manner prior to accepting a guilty plea:

> **(c) Advice to Defendant.** Before accepting a plea of guilty or novo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines ~mnder some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, tat the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self- incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial.

Compliance with Rule 11' s procedures enables the district Court to determine for itself the voluntariness of the plea and "facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. *United States v. Lopez-Pineda*. .55 F.Sd 693, 696 (it' Cir, 1995) (citations omitted); *accord*, *United States* v. *Noriega-Millan*, 110 F.3d 162, 166 (1St Cir. 1997). If a *habeas* petitioner maintains that his statements at the Rule 11 hearing were inaccurate, he must "present valid reasons why he should be relieved of his statements." *Ouellette v. United States*. 862 F.2d 371, 375 (1" Cir. 1988) (quoting *Walker v. Johnston*, 312 U.S. 275, 286 (1941)); *accord*, *Panzardi-Alvarez v. United States*,

879 F.2d 975, 982 (1" Cir. 1989).

Here, contrary to Carrasquillo's assertions, the record reflects that the trial court I explained to Carrasquillo the nature and substance of the charges to which he *was* pleading (guilty (Criminal Case No. 96-001(PG), Docket No. 474, p. 4). The Court further advised defendant that by pleading guilty he was giving up his right to a jury trial which included, among others, the right against self-incrimination and to challenge the government's evidence (Criminal Case No. 96-001(PG), Docket No. 474, pp. *5-7).* With regard to the possible sentence, the trial court explained that the plea agreement called for a maximum sentence of 25 years in prison as to Count one, and a mandatory five-year sentence as to Count two, this last term to run consecutively to the sentence imposed in Count one (Criminal Case No. 96-001 (PG), Docket No. 474, pp. 8, 12-13). At that time, Carrasquillo indicated that he understood each one of these advisements (Criminal Case No. 96-001 (PG), Docket No. 474, pp. 4-8, 12-13).

Although petitioner now claims, in his *habeas* petition, that he did not understand his rights, he has failed to provide any specific reason to disbelieve the statements that he made, under oath, at the Rule 11 hearing. As the existing record belies his claim, it must be summarily denied.

3. Ineffective Assistance of Counsel

Carrasquillo claims that the record contains evidence of incompetency, and that his attorney rendered ineffective legal assistance by failing to raise this issue before the trial court (Docket No. 1, pp. 2-3). In addition, Carrasquillo maintains that his attorney provided "ineffective explanations" of his "trial fights and alternatives," his right against self-incrimination, and the sentencing consequences of his plea (Docket No. 1, p. 2). For the reasons

provided below, we reject Carrasquillo's ineffective assistance of counsel claims.

The U.S. Supreme Court has set forth a two-prong test to determine whether a defendant has been denied a Sixth Amendment right to counsel. A conviction may be set aside because of ineffective assistance of counsel if: (a) considering all the circumstances, counsel's performance fell below an objective standard of reasonableness; and (b) there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *accord*, *Panzardi-Alvarez v. United States*, 879 F.2d 975, 982-83 (1st Cir. 1989). This standard applies to challenges to guilty pleas, as well as attacks on convictions resulting from trials. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

When a petitioner challenges a guilty plea on the grounds of ineffective legal assistance, in order to show prejudice he must prove that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59; accord, *United States v. Mateo*, 950 F 2d 44, 47 (1st Cir. 1991). In a post-conviction proceeding; the burden is on the petitioner to demonstrate ineffective assistance by a preponderance of the evidence. *Lema v. United States*. 987 F.24 48, 51 (1st. Cir. 1983).

a. Counsel's Failure to Raise Competency Issue

There can be no deficiency on the part of counsel in failing to request a competency hearing when there is no evidence of incompetency. *McCoy v. Lynaugh*, 874 F.2d 954, 964 (1st Cit 1989); *accord*, *Caner v. Johnson*, 131 F.36 452, 464 (5th Cir. 1997). With regard to Carrasquillo's claim of incompetency, we have already determined that the record contains no evidence to support this claim. *See* Section II.A. Indeed, the record supports the opposite.

The defendant never reported to counsel the existence of any mental condition nor did defendant's mother. The record is void of any such indication and defendant's demeanor and actions during the pretrial stages of the case clearly led the defense attorney and the government to the opposite conclusion (Docket Nos. S and *6).* More so, defendant was submitted to a psychological evaluation. The psychologist, Dr. Umpierre, concluded that Carrasquillo was competent to proceed. Thus, as stated earlier, Carrasquillo's § 2255 motion fails to indicate what evidence, if any, other than Dr. Umpierre's report, relates to his mental condition or would help to support his claim of incompetency to plead guilty.

Under these circumstances, we find as a matter of law that defense counsel's alleged to raise the issue of competency did not constitute ineffective assistance of counsel. *See* Wallace v. Ward, 191 F 3d *1235,* 1243-12~ (10"' Cir. 1999) (where record reflected that petitioner had been examined several times during the preceding years and was always determined to be competent, and where his behavior during court proceedings did not suggest incompetency, trial counsel did not render ineffective assistance by failing to raise issue of competency); Galowski v. Berge, 78 F 3d 1176, 1180 (7th Cir. 1996) (trial counsel was not ineffective based on his failure to raise competency issue, where he arranged for psychiatric evaluation, which concluded that petitioner was competent; 'Once [defense counsel] received [the psychiatrist's] report we find it difficult to imagine why he would have requested a hearing); Crenshaw v. Wolff, 504 F 2d 377, 380 (8th Cir. 1974) (petitioner did not receive ineffective legal assistance where "there was no evidence that trial attorney knew or should have known about petitioner's possible incompetency").

b. Failure to Properly Advise Carrasquillo of his Rights

1) Ineffective Assistance

There is no evidence in the record supporting Carrasquillo's claim that his attorney's performance was inadequate. Even if counsel, prior to defendant entering his plea, had not provided him with proper advice, the record reflects that Carrasquillo signed a written plea agreement, which advised him of the elements of each charge in the indictment and the applicable sentences for each charge (Docket No. 5, Exh. 14). The plea agreement also advised Carrasquillo) that he could proceed to trial rather than plead guilty, and that at trial he would retain the privilege against self-incrimination (Docket No. 5, Exh. 14). Carrasquillo's signature appears at the bottom the plea agreement (Docket No. 5, Exh. 14, p. 9). In addition to this signature, Carrasquillo signed the plea agreement a second time, indicating that he had "reviewed every part of it with [his] attorney" (Docket No. .5, Exh. 14, p. 10). The written plea agreement also contained a notation, signed by attorney Lydia Lizarribí-Masini, reflecting that she had "carefully reviewed every part of this Plea Agreement with the defendant's[10] (Docket No. 5, Exh. 14, p. 10). After signing this plea agreement, Carrasquillo appeared before the trial court, at which time he acknowledged that he was "representing to the Court that [he was] satisfied with the services of [his] attorney, Miss Lizarríbar Masini and [he was] acknowledging] that she ha[d] rendered effective assistance" (Criminal Case No. 96-001, Docket No. 474, p. 15). At the Rule 11 hearing, the Court assessed and was satisfied with defendant's

[10] Ms. Lizarribar-Masifli has also submitted a pleading detailing her efforts in this case (Docket No. 5). However, this pleading is not a sworn statement, and as such will not be considered as evidence for purposes of this ruling.

knowledge of his constitutional rights. The record contains no evidence that Carrasquillo was dissatisfied with Ms. Lizarríbar Masini's legal services, or that she had failed to adequately advice him of his legal rights. Under these circumstances, we find that Carrasquillo's claim of inadequate legal advice is conclusively refuted by the files and records of the case. *See Lema v. United States*, 987 F.2d 48, 51-52 (1st Cir. 1993). *Barrett v. United Slates*, 965 F.2d 1184, 1186 (1st. Cir. 1992).

2) Prejudice

Carrasquillo does not allege that his attorney provided erroneous advice, but merely that she provided insufficient advice. Even if this accusation were true, it would not constitute grounds for the withdrawal of Carrasquillo's plea, as any potential prejudice was cured by the trial court's thorough advisement of all relevant constitutional rights, and by Carrasquillo's affirmation that he understood those rights, immediately prior to the entry of the guilty plea. *See United States v. Home*, 987 F.2d 833, 835 (D.C. Cir. 1993) (despite mistaken advice of counsel regarding applicable sentencing range, defendant suffered no prejudice where the trial court correctly apprized him of the statutory penalty).

Finally, it must be noted tat Carrasquillo's petition does not aver that he would have gone to trial absent the alleged errors of counsel, nor does the petition suggest that Carrasquillo was innocent of the crimes for which he was charged (Docket No. 1). Where a *habeas* petitioner challenges the validity of his guilty plea based upon a claim that counsel provided inadequate advice, but falls to allege that he would he would have exercised his right to a trial in the absence of such advice, the petition may be summarily denied. *See Hill v. Lockhart, supra*, 474 U.s. at 60 (trial court did not err in declining to hold a hearing on petitioner's ineffective assistance of

counsel claim, where "[Petitioner did not allege in his to appeal the District Court's order. *United States v. Valencia-Copete*, 792 F 2d 4, 6 (1st Cir. 1986); *Park Motor Mar. Inc. v. Ford Motor Co.*, 616 F. 2d 603 (1st Cir. 1980). The parties are advised tat review of a Magistrate-Judge's Report and Recommendation by a District Judge does not necessarily confer entitlement as of right to a *de novo* hearing and does not permit consideration of issues not raised before the Magistrate-Judge. *Paterson Leitch v. Massachusetts Elec.*, 840 F.2d 985 (1st Cir. 1988).

SO RECOMMENDED.

At San Juan, Puerto Rico, this 31St of March, 2000.

s/ **AIDA M. DELGADO-COLON**
U.S. Magistrate-Judge

Appendix #5

[Seal not legible]

IN THE UNITED STATES DISTRICT COURT
FOR THE JUDICIAL DISTRICT OF PUERTO RICO

MARCOS CARRASQUILLO GÓMEZ,
Petitioner,

v.

Criminal No. 99-1462 (PG)
Re:Criminal No.96-01(PG)

UNITED STATES OF AMERICA
Respondent

PETITIONER'S OBJECTIONS TO MAGISTRATE-JUDGE REPORT AND RECOMMENDATION

TO THE HONORABLE COURT:

1. The Magistrate Judge has entered a Report and Recommendation on April 7, 2000 denying the present Petition without the benefit of a hearing. The Court based its recommendation on the conclusion that there is no genuine issue of mental competency in the present case for purposes of the plea and therefore no ineffective assistance of counsel in that procedure.
2. A clinical psychologist submitted defendant to Competency evaluation on February 1996, for

purposes of a transfer from juvenile to adult jurisdiction. From that evaluation, based on only two interviews, it was concluded among other things, that Mr. Carrasquillo "has limited appraisal of the judge, jury, prosecuting attorneys and witness roles." And also, that "He understand the nature of the adversary process but needs further clarification in some areas" (Docket No. 5, Exh. 5, pp. 5-6.) This evaluation, in the overall was used to sustain a transfer of jurisdiction of the juvenile.

3. Given the Sentencing implications of this transfer of jurisdiction where petitioners status as a juvenile would have prevented him from the extension and nature of penalties under the charges and considering the cited findings of the competency evaluation, the transfer was the most crucial stage of the procedures and should have been actively pursued both to attack the transfer of jurisdiction and to pursue further the ambiguous findings of the appointed psychologist which, nevertheless, point to his lack of understanding of crucial elements of the trial process itself.

4. The record shows no such effort on his defense, so the inactivity of his defense placed the defendant in a no-win situation where all remaining alternatives where disastrous for him (life incarceration or capital punishment) and his very competency was override by the ambiguous but exclusive evaluation on the record, although the evaluation itself points out to real issues of lack of awareness and understanding of the procedures.

5. It is not true that the record does not show any other reference to the mental capacity of

defendant, since from the early stages of intervention it was noted that defendant, while a juvenile, had been under psychological treatment: on the pretrial services report prepared after his arrest in New York by the Brooklyn (Eastern District) Office. Under heading 3 "Health" it is noted: "the defendant did report that he was treated several months ago by psychologists for headaches. The defendant's mother verified this...

Also In the presentence report, page 13, under the heading Mental and Emotional it is noted "After the defendant admitted his sexual abuse by a stranger his mother took him to obtain psychological treatment. As a result of the above petitioner falls into record at different times of the proceedings and that does not include additional means that diligent fact finding may provide. This circumstance is underlined by the fact that no adequate attention was granted by the defense to the matter of transfer of jurisdiction, where defendant could have been insulated against a death sentence or a life term. There being previous indications of mental conditions this would have been the place and opportunity to fully pursue the matter and take all measures to ascertain *k* defendants mental capacity for all judicial purposes. Wallace v. Ward 191 F. 3d. 1235, 1243-44 (10th Cir., 1999) finds no ineffective assistance of counsel where petitioner had been examined during the preceding years and found competent, in the present case the contrary is true: counsel had sufficient indications in the record to raise the issue and, furthermore, given the abysmal difference that the issue would have on Sentencing it was a crucial issue to be

pursued with utmost vigor and attention.

WHEREFORE, defendant respectfully requests from the Honorable Court that Petition not be dismissed, requested discovery be allowed and hearing be held to determine if vacation of Sentence is warranted by the alleged circumstances together with any other dispositions proceeding under the law.

RESPECTFULLY SUBMITTED.

At San Juan, Puerto Rico this 17th day of April 2000

CERTIFICATION: a true copy was delivered on this date to the AUSA at his address of record.

s/ **JOHN WARD-LLAMBIAS, ESQ.**
USCA- 201013
BOX 6221, LOÍZA STATION
SAN JUAN, P.R. 00914
TEL. (787) 721-7080
FAX. (787) 724-0513

Appendix #6

Seal :
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Office Clerk
US. DISTRICT COURT.
San Juan, PR]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MARCOS CARRASQUILLO GÓMEZ, Petitioner,	*
	* Criminal No.
v.	* 99-1462 (PG)
	* Re:Criminal
	* No.96-01(PG)
UNITED STATES OF AMERICA Respondent	*

JUDGMENT

The Court has entered an order approving and adopting the Magistrate-Judge's Report and Recommendation issued on March 31ST, 2000. THEREFORE, it is hereby

ORDERED and ADJUDGED that Marcos Carrasquillo-Gômez's petition under 28 U.S.C. § 2255 is hereby DISMISSED.

IT IS SO ORDERED.

San Juan, Puerto Rico August 17, 2000.

s/ Juan M Pérez-Gimenez
USS. District Judge

Appendix #7

Seal :

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Office Clerk
US. DISTRICT COURT.
San Juan, PR]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MARCOS CARRASQUILLO GÓMEZ,	*
Petitioner,	*
	* Criminal No.
v.	* 99-1462 (PG)
	* Re:Criminal
	* No.96-01(PG)
UNITED STATES OF AMERICA	*
Respondent	*

OPINION AND ORDER

Now before the Court is the U.S. Magistrate Judge's Report and Recommendation concerning petitioner Marcos Carrasquillo-Gc5rnez's motion to vacate sentence under 28 U.S.C. § 2255 (Docket #7) Petitioner Carrasquillo filed his objections to the report and recommendation (Docket #8).

Background

Carrasquillo was initially charged and processed as a juvenile. A psychological evaluation was

performed in order for the Court to determine whether petitioner *was* to be transferred to adult status. As a result of the evaluation the Court ordered Carrasguillo to be transferred to adult status. Subsequently he pled guilty to both charges.

Discussion

Petitioner claims that his guilty plea was unknowing and unintelligent due to diminished mental capacity and that his counsel was ineffective in failing to raise the issue. He moves the Court to allow discovery as to his mental competency and request that a hearing be held to determine whether to vacate his sentence.

Mental disease or deficiency alone does not establish that a criminal defendant is incompetent. See, e.q. Martin V. Dugger. 696 F. Supp. 1523, 1572 (S.D. Fla. 1988), affd. 891 F.2d 807 (11th Cir. 1989) cert denied 498 U.S. 881 (1990).

The general rule is that whenever there is a good faith doubt as to a defendant's competency, a hearing is required. See Smith v. Ylst, 826 F. 2d 872, 876 (9th Cir. 1987), cert. denied 488 U.S. 829 (1928) See also United States v. Newman *733* F. 2d 1395, 1400 (10th Cir. 1984) (a hearing is required "if information comes to a trial court's attention that raises a bonafide doubt about the defendant's competency to stand trial"); Figueroa-Vazquez v. United States, 718 F. 2d 511 (1st Cir. 1983) (a competency hearing is required "whenever there is reasonable cause to believe that [the accused] may be present insane or otherwise *so* mentally incompetent as to be unable to understand the proceedings against *him* or properly to assist *in* his own defense' 18 U.S.C. § 4244'). The *test* for competency to enter a guilty plea is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational

understanding and whether he has a rational as well as a factual understanding of the proceeding against him. Dusky v. United States, 362 U.S. 402, 402 (1960); Allard v. Helgemoe, 572 F.2d 1,4 (1st Cir.) cert. denied 439 U.S. 858 (1978). Doubt as to a defendant's competency exists when there is "substantial evidence" of incompetence. United States v. Lewis, 991 F.2d 524, 527 (9th Cir.). cert. denied, 510 U.S. 878 (1993). Evidence of incompetency can include a history of previous irrational behavior, a defendant's demeanor before the trial court, and available medical evaluations. Drope v. Missouri, 420 U.S. 162, 180 (1975).

In his opposition to the magistrate's report and recommendation the only facts Carrasquillo raises to generate doubt as to his mental competence are: the alleged ambiguous findings made in the evaluation of the appointed psychologist, a reference on a pretrial service report that he was treated by psychologists for headaches and a statement in a presentence report that his mother took him to obtain psychological treatment after he admitted sexual abuse by a stranger. These "bits of information" do not constitute "reasonable cause" to believe that Carrasquillo was mentally incompetent at the time of his guilty plea especially in light of the following factors.

The psychological evaluation clearly showed that although Carrasquillo did not understand all the nuances of the legal functioning of the court, he did have sufficient ability to consult with his lawyer and he had a rational as well as a factual understanding of the proceedings against him. Furthermore, Carrasquillo's counsel represented to the Court that he understood the nature of the proceedings, and had sufficient ability to consult with counsel. This statement is significant *because* counsel '~more *than any* other *party or* the court, is in a position to

evaluate a defendant's ability to understand the proceedings [.]"Balfour v. Haws, 892 F.2d 556, 561 (7th Cir. 1989); Figueroa-Vázquez v. United States, supra. The record also indicates that petitioner was aware of the charges against him and that he understood the consequences of his plea. The Court had the opportunity to observe petitioner and through elicitations from him confirmed that the plea was knowing and voluntary and was supported by a factual record. Under the present facts to find 'reasonable cause' to believe that Carrasquillo was mentally incompetent at the time he pled guilty "would come close to requiring district courts to order competency hearings *sua sponte in* every case where a defendant has some history at psychiatric treatment and, even vaguely, mentions the problem... Neither the statute nor the law suggest mach requirement." Figueroa-Vázquez, 718 F.2d at 512.

Petitioner claims that under 28 U.S.C. § 2255 he is entitled to an evidentiary hearing to determine his mental *state* at the time of his plea and sentencing hearings. Section 2255 provides that a hearing is not required if "the motion and the tiles and records of the case conclusively show that the prisoner is entitled to no relief..." 28 U.S.C. § 2255. As described before, the transcripts from the plea and sentencing hearings, the statement from Carrasquillo's attorney and the report of the psychologist are conclusive evidence of petitioner's competency. The bits of information provided by Carrasquillo do not generate a real, substantial and legitimate doubt as to his competence at the time he pled guilty. Carrasquillo's unsupported allegation that he was incompetent is not enough to warrant an evidentiary hearing. See Langston v. United States, __F.Supp. 2d__.. 2000 WL 876552 (E.D. Penn) ("If a defendant's mere allegation that she was incompetent to stand trial were enough to warrant an evidentiary hearing, an evidentiary

hearing would be required in every § 2255 case in which competence is raised").

WHEREFORE, in view of the above, the Court hereby APPROVES and ADOPTS the Magistrate Judge's Report and Recommendation and in accordance therein, petitioner's 2255 petition is hereby DISMISSED.

IT IS SO ORDRRED.

San Juan, Puerto Rico August 16, 2000.

s/ Juan M. Pérez-Gimenez
U.S. District Judge

Appendix #8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Marcos Carrasquillo
Plaintiffs

VS.

United States of America
Defendants

No. 00-2182

MEMORANDUM IN SUPPORT OF ISSUANCE OF CERTIFICATE OF APPEALABILITY

I JURISDICTION

1. In order to defeat the attack of its jurisdiction under 28 USC 5032 and U.S. v. M.I.M. 932 F2d 1016 (CA1, 1991) and subsequent cases, the Court concludes that "good faith efforts by the government to provide the Court with documentation of a juvenile's prior record" suffice to grant jurisdiction (see Opinion and Order, February 8, 2001 down page 3) and that the Courts have vacated adjudications of delinquency "when there has been absolutely no effort by the government to comply with the record certification requirement or when the government knows of the existence of juvenile records but makes no effort to provide them to the District Court". (id. p. 3)
2. On the other hand the law says clearly otherwise: "A juvenile shall not be transferred to adult prosecution nor shall a hearing be

held under section 5037 until any prior juvenile court records have been received by the court, or the clerk of the juvenile Court has certified in writing that the juvenile Court has no prior records, or that the juvenile record is unavailable and why it is unavailable." 18 U.S.C. § 5032 (emphasis added)

3. The District Court goes further in its broad interpretation of the law when it affirms, "a good faith proffer of the absence of juvenile records is what is required by U.S. v. MIM p.1019, supra, (p.4). As related in the Opinion and Order in the present case it was concluded by the Court that defendant had no prior record based upon "pre-sentence reports considered by both the Magistrate Judge and this Court". That takes the District Court's interpretation to a broader level, since a pre-sentence report is generally based on hearsay sometimes, unrevealed sources of varying degrees of reliability since it is he the result of available data and interviews of friends and foes. It is hard to imagine how those alternatives may replace a Court record certified by the clerk.

4. The District of Court affirms that U.S. v. MIM supra, establishes that a good faith proffer is enough to satisfy section 5032 (id, p.4). An examination of the decision regarding this matter in the Court of Appeals for the First Circuit and other Circuits suggest that a "good faith effort" or a "proffer", or a "conclusion" by the Court based on the pre-sentence report are not sufficient to satisfy the requirement of section 5032 and therefore the District Court never acquired jurisdiction over the defendant.

5. The reference to a "good faith effort" as sufficient is an interpretation of MIM supra, which does not follow the holdings of this case. The reference to a "good faith effort" is a negative one where U.S. v. Cuomo 525 F2d. 1289,1289 (CA5, 1976) is cited as an illustration of the opposite position. In Cuomo the opposite is held, that it was not necessary to file the juvenile record before the Information in order for the Court to acquire jurisdiction. On the contrary MIM clearly establishes that "filing of the information must await receipt of the of the required records... and therefore the jurisdiction of this District of Court was not properly invoked (see MIM, p.1919).

6. To be more precise the Court in MIM relies on U.S. v. Brian 900 F2d 218, 221 (C 10,_1990) establishing that "the records must be received before filing of the information. Also see U.S. v. Juvenile Male 932 F2d 614, 620 (CA8, 1991). U.S. v. Wong 40 F3d 1347, 1369 is a case that seems to sustain a "flexible" interpretation of section 5032. Among other things it concludes "such records are relevant to proper disposition of the offender, but not to the initial delinquency adjudication". There is no way to reconcile this with the letter of the law and all other interpretations by the Courts saying that the juvenile records must be filed before the information, Certainly the law ordains that the record be filed before the information and it is clear that its intended use is at this initial stage of the proceeding. Certainly this not the doctrine of the First Circuit Court which follows the letter of the law and upholds the jurisdiction al character of this procedure the fundament al reasoning

beginning with MIM and still followed in this Circuit.

II. ISSUE OF MENTAL COMPETENCY AND ADEQUATE ASSISTANCE OF COUNSEL

7. The District of Court addresses only the issue of reasonablecause to believe that defendant Carrasquillo was mentally incompetent at the time he plead guilty. The authority cited by the Court, is U.S. v Figueroa Vázquez 718 F2d 511, 522 (CAI, 1983). In the Figueroa Vázquez case (which is not a juvenile case) the defendant was examined by two psychiatrists and found competent. In the present case the Court wrongly concluded that there were no grounds in the record of previous mental infirmity while the contrary is true the defendant has a history of mental symptoms stemming from his infancy when he was sexually abused, reference is made to this in his pre-sentence report (see p.13). This is documented in the record by in the Pretrial Services report and in the pre-sentence report.

8. The report submitted by a clinical psychologist of the government was based on only two visits. Still his report mentions, "Limited appraisal of the judge, jury, prosecutor, attorney and witness roles." Also "he understands the nature of the adversary proceedings but needs further clarification in some areas (see docket 5, Exh. 5 p.5-6.) Being a juvenile and his capacity to comprehend the procedures being in issue, a competency hearing was essential to protect his due process right. That is specially true when the determination of mental competency was decisive in sentencing as a juvenile for a short number of years, or as an adult for a life

sentence as imposed or ever the risk of a death penalty.

9. The defense did not pursue this critical crux for defendant and did not provide expert testimony to sustain his mental incompetence or suitability of a transfer of jurisdiction.

10. The contradiction is to establish at one time that defendant waived his right to have a hearing to establish his mental competence where competency is at issue Pate v. Robinson 383 U.S. 775, 384 (1966) Tayler v. U.S. 282 F2d. 16, 23 (CA8, 1960).

11. In Strickland v. Washington 104 SCT 2052, 2054 (1984) the test for granting relief under section 2255 is established in two components: that counsel's performance was deficient and that this deficient performance prejudiced the defendant in a manner so serious that he was deprived of a fair trial. (Also Bottosom v. Moore 234 F2d 526, 532 (CA11,2000) Defendant in the present case was transferred to the adult jurisdiction (assuming the Court had jurisdiction) and exposed to life sentence or death penalty, with no effort by his attorney to (a) question the jurisdiction (b) resist the transfer (c) bring the issue of mental competence using a detense mental health expert to overturn the government position regarding competency and transfer.

12. In Mc Gregor v. Gibson 219 F3 1245 (CAIO,2000) (not a juvenile case) the Court considered entering the issue of mental competency where defense attorney failed "to obtain and present psychiatric evidence in support of his claim of incompetence. According to the Court this circumstance

creates " a bona tide doubt as to his competency"

13. In Sum, the Court had no jurisdiction to proceed with defendant as an adult for lack of compliance with section 5032 of the Juvenile Delinquency Act; in addition defendant was not effectively represented where a crucial stage of the proceeding was not pursued with reasonable diligence and the result being a life sentence instead of the remainder years of the juvenile as such.

14. The proper remedy is to revoke any sentence for want of jurisdiction and/or to vacate judgment for ineffective legal representation.

RESPECTFULLY SUBMITTED.

CERTIFY: A true copy of this document has been mailed to the U.S. Attorney and at his address of record.

s/ JOHN WARD-LLAMBIAS, ESQ.

USCA- 201013

BOX 6221, LOÍZA STATION

SAN JUAN, P.R. 00914

TEL. (787) 721-7080

Appendix #9

Seal :
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Office Clerk
US. DISTRICT COURT.
San Juan, PR]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MARCOS CARRASQUILLO GÓMEZ, Petitioner,	*
	* Criminal No.
v.	* 99-1462 (PG)
	* Re:Criminal
	* No.96-01(PG)
UNITED STATES OF AMERICA Respondent	*

OPINION AND ORDER

Now before the Court is petitioner's Application for a Certificate of Appealability. 28 U.S.C.A § 2253(c)(I) provides that appeal from a § 2255 final order may be taken only when a circuit justice or judge issues a certificate of appealability. A certificate of appealability may issue only when the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C.A §2253(c)(2). While a district court may issue or deny the requisite certificate of appealability, petitioners are allowed to seek supplemental certificates from the court of appeals in certain circumstances. *See* US. v. Barrett, 178 F.3d 34,40 (1st Cir. 1998); But v. Dipaolo, 170 F.3d 232, 236-38 (lst Cir. 1999); Grant Chase v Commissioner of New Hampshire Dep't of Corrections, *145* F.3d 431, *435* (P^t^ Cir. 1998) (Noting

that "every court of appeals tat has considered the question has concluded that a district judge may issue a certificate of appealability").

In his application for a certificate of appelability petitioner makes two arguments. First, petitioner argues that the Court never acquired jurisdiction over him under *US. v. M.I.M*, 932 F. 2d. 1016,1019 (1st, cir. 1991) and *U.S. v, Wong* 40 F. 3d 1347, 1364 (2nd Cir. 1994) and second, petitioner contends that he was denied his right to effective counsel because his attorney failed to bring to the Court's attention his traumatic emotional condition. After reviewing the record, the Court finds that petitioner has not made a substantial showing of a denial of a constitutional right as to any of the issues he presents. Petitioner has simply failed to demonstrate that "the issues axe debatable among jurists of reason; that could resolve the issues [in a different manner]; or that the questions arc 'adequate to deserve encouragement to proceed further.'" *Gee v Shillinger*, 979 F. 2d 176, 178 (l0th Cir. 1992); *See also Wells By and Through Kehne v. Arave*, 18 F.3d 656, 658 (9th Cir. 1994); *Sawyers v. Collins*, 986 F.2d 1483, 1506 (5th Cir. 1993). Petitioners application for a certificate of appelability is thus DENIED.

Petitioner's second argument can be summarily dismissed. In his § 2255 motion, petitioner presented to the Court the argument that he was denied his right to effective counsel. In resolving that motion, this Court emphatically stated that

> "Under the present facts, to find 'reasonable cause' to believe that Carrasquillo was mentally incompetent at the time he plead guilty "would come close to requiring district courts to order competency hearings *suet sponte* in every case where a defendant has some history

> of psychiatric treatment and, even vaguely, mentions the problem... Neither the statute nor the law suggest such requirement." Citing *Figueroa-Vázquez*, 718 P.2d 511,512 (1st Cir. 1983).

The court went further and explained that

> "As explained before, the transcripts from the plea and sentencing hearing, the statement from Carrasquillo's attorney and the report of the psychologist are conclusive evidence of petitioner's competency. The bits of information provided by Carrasquillo do not generate a real, substantial and legitimate doubt as to his competency at the time he plead guilty".

The Court sees no reason for why it should doubt or change its prior ruling. Petitioner has simply failed to make a substantial showing that he was denied his right to effective counsel.

Petitioner's first argument deserves more pause. Petitioner argues that the Court never acquired jurisdiction over him because the procedures failed to satisfy the requirements of 18 U.S.C. § 5032. That section provides that

> A juvenile shall not be transferred to adult prosecution nor shall a hearing be held under section 5037 (disposition after a finding of juvenile delinquency) until any prior juvenile court records of such juvenile have been received by the court, or the clerk of the juvenile court has certified in writing that the juvenile has no prior records, or that the juvenile's record is unavailable and why it is unavailable.

18 U.S.C. § 5032. Failure to satisfy the mandates of § 5032 before the information is filed results in the dismissal of the in formation without prejudice, U.S. v. M.I.M. 932 F.2d 1016,1019 (lst Cir. 1991). The Court is convinced that the criminal proceedings against petitioner satisfied the mandates of § 5032.

Although the statutory language is amenable to strict interpretation, most federal courts have read the provision to require only good faith efforts by the government to provide the court with documentation of a juvenile's prior record. US v. Wong, 40 F.3d 1347, 1369 (2nd cir. 1994); *But see impounded* 120 F.3d *457,461* (3rd Cir 1997) (where the circuit-court concludes that the statute requires strict and literal compliance). The certification provision should be read to afford the government a limited amount of flexibility. *Id. See also* United States v. Parker, *956* F.2d 169, 171 (Sth Cir. 1992). Courts that have vacated adjudications of delinquency on direct appeal have done so when there has been absolutely no effort by the government to comply with the record certification requirement or when the government knows of the existence of juvenile records but makes no effort to provide them to the district court. *Impounded,* 120 F.3d at 460-61. This is certainly not the situation presented by the present case.

The record of the case indicates that before petitioner was transferred to adult status the government provided the Honorable Magistrate Judge Aida M. Delgado with notice of petitioner's delinquency record in the form of a pre-trail services report. The pretrials report clearly states that a search of the NCIC and computerized local records check failed to reveal any prior criminal record.. Additionally, this Court reviewed the issue of whether petitioner had a prior delinquency record before transferring petitioner's case to adult status.

The March 8, 1996 Opinion and Order concluded that petitioner had no prior delinquency record. Thus although it seems that the this Court never actually received a written certification from the clerk of the juvenile court stating that the juvenile had no prior record, those records were summarized in pensioner's pre-sentence report and Considered by both the Magistrate Judge and this Court before ordering the transfer of the minor to adult status.

The Court is mindful of the fact that the government should always endeavor to supply the district court with official juvenile records or a written certification of their non-existence prior to the filing of the information. U.S. v. *Wang*, 40 P.3d at 1370. Nonetheless, the government substantially complied with the mandates of§ 5032. Both the Magistrate Judge and this Court were aware of the fact that petitioner did not have any prior records, The Court thus received a good faith proffer of the absence of juvenile record as required by *MIL.M* decision. *See* U.S. *v. MI.M* 932 F.2d at 1019 (Holding that until the Court receives a good faith proffer of the juvenile records or a certificate as to their absence, no proceeding may begin against the juvenile). Courts confronting similar factual situations have read the statute to confer some degree of flexibility to the government and have concluded that the requirements of §5032 have been met. *See, e.g.* US. v. *Wong*, 40 F.3d at 1370; *United States v. Cuomo*, 525 F 2d 1285, 1289 (5th Cir. 1976). Wherefore, Petitioners request for a Certificate of Appealability is DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, February 8,2001.

s/ Juan M. Pérez-Gimenez

U.S. District Judge

Appendix #10

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 00-2182

MARCOS CARRASQUILLO,
Petitioner, Appellant,

V.

UNITED STATES,
Respondent, Appellee.

Order Of Court

Entered: March 21, 2001

On October 24, 2000, this court docketed petitioner-appellant's appeal from the denial of his 28 U.S.C. §2255 petition. A certificate of appealability must issue in order for the appeal to proceed. *See* 28 U.S.C. §2253(c). The district court denied plaintiff-appellant's request for a certificate on February 12, 2001.

We will treat petitioner-appellant's notice of appeal as a request for a certificate of appealability from this court. Plaintiff-appellant is ordered to file a memorandum, by **April 4, 2001**, setting forth specific facts, reasons, and issues supporting

issuance of a certificate. *See* Local Rule 22.1. *See also* 28 U.S.C. §2253(c)(2)(in order for a certificate to be granted, applicant must make substantial showing of the denial of a constitutional right).

After April 4, 2001, if petitioner-appellant has not filed a memorandum, the certificate of appealability will be denied without further consideration, and the appeal will be terminated.

By the Court:
Phoebe D. Morse, Clerk

JANICE M. O'NEIL

s/ By_____
Chief Deputy Clerk

[cc: Messrs. Ward Llambias,
Rodriguez Coss, Perez Sosa]

Appendix #11

United States Court of Appeals
For the First Circuit

No. 00-2182

MARCOS CARRASQUILLO,

Petitioner, Appellant,

V.

UNITED STATES,

Respondent, Appellee.
Before
Campbell, Bownes and Cyr,
Senior Circuit Judges.

JUDGMENT

Entered: December 11, 2001

After due consideration, we deny the petitioner's request for a certificate of appealability and terminate the appeal, as he fails to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

By the Court:
Richard Cushing Donovan, Clerk
s/ By: JULIE GREGG
Appeals Attorney

[Cert. cc: Hon. Juan M. Pérez—Gimenez and Frances Ríos de Moran, Clerk, U.S.D.C. of Puerto Rico, cc: Messrs: Ward Llambías, Perez Sosa and Ms. Rodriguez-Coss]

Appendix #12

UNITED STATES COURT OF APPEALS

For the First Circuit

CRIMINAL

NO. 00-2182

MARCOS CARRASQUILLO

PLAINTIFFS - APPELLANTS

Vs.

UNITED STATES

RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT

FROM THE DISTRICT OF PUERTO RICO

PETITION FOR PANEL REHEARING

JOHN WARD-LLAMBIAS, ESQ.
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SAN JUAN, P.R. 00914
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UNITED STATES COURT OF APPEALS

For the First Circuit

CRIMINAL

NO. 00-2182

MARCOS CARRASQUILLO

PLAINTIFFS - APPELLANTS

Vs.

UNITED STATES

RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT

FROM THE DISTRICT OF PUERTO RICO

PETITION FOR PANEL REHEARING

TO THE HONORABLE COURT:

ENTERS NOW the defendant Marcos Carrasquillo through his undersigned attorney and respectfully requests from the Court:

1. The Court has denied petitioner's request for a certificate of appealability for want of substantial showing of the denial of a constitutional right.

2. We adopt by reference our request for certificate of appealability.

3. No mention is made in the Judgment of the lack of jurisdiction issue which if true would by itself be the most broad denial of substantive due process where a minor has been deprived of the safeguards of the Juvenile Act and of his deprivation of liberty without due process prohibited by the Fifth Amendment of the Constitution.

4. This Court has since long established, as well as other Circuits that non-compliance with the prohibition that a juvenile shall not be transferred to adult prosecution nor shall a hearing be held under 18 U.S.C. Section 5037 "until any prior juvenile records of such juvenile have been received by the court, or the clerk of the juvenile court has certified in writing that the juvenile has no prior record or that the juvenile's record is unavailable and why it is unavailable." In United States v. M.I.M., 923 F2d 1016 (CA1, 1991) this court established that the prohibition contained in the last paragraph of Section 5032 is so clear that it is not in need of interpretation. Also established was the jurisdictional effect of non-compliance with the filing of the prior record of the juvenile.

5. Aside from the jurisdictional deficit and the clear mandate of the law, there is also reason beyond the mere filing of the juvenile's prior record, Section 5032 also orders that as part of the transfer procedure: "Evidence of the following factors should be considered, and findings with regards to each factor should be made on the record, in assessing wether a transfer would be in the interest of justice ...

the extent and nature of he juvenile's prior records... (18 USC 5032) (Emphasis added) those factors respond to the purpose of the law to provide a meaningful consideration of the wele being of the juvenile.

6. On appeal, these six statutory factors are reviewable to determine if transfer to the adult jurisdiction was proper. United States v. ABJ 108 F3d 851 (CA8, 1997) How can the district Court make any findings regarding the prior juvenile record of defendant if it was not obtained as the law ordains? How can there be review on appeal without corresponding findings on the record? In the instant case there was a previous record and previous psychological background, which did not come before the attention of the Court as, explained in the petition. Even the government psychologist portrays defendant as not normal in comprehension of the procedures as described in the petition.

7. The transfer of defendant to the adult jurisdiction without complying with the requisites of law is against the intent of the act and deprived the Court of jurisdiction as ruled by this Court and other Circuits.

8. If finding for defendant for want of jurisdiction, existing policy will be maintained for the benefit of this and other juveniles who have been granted this procedural guarantee to preserve unique conditions and individual circumstances of juveniles facing the criminal justice system with less than sufficient resources to face punishment or support.

WHEREFORE, appearing attorney for defendant respectfully requests from the Honorable Court that a certificate of Appealability be issued in the present case.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico on this day December 26, 2001.

CERTIFY: that a true copy of this motion has been sent to the US Attorney at his address on record.

s/ JOHN WARD-LLAMBIAS, ESQ.
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Appendix #13

United States Court of Appeals
For the First Circuit

No. 00-2182

MARCOS CARRASQUILLO,
Petitioner, Appellant,
V.
UNITED STATES,
Respondent, Appellee.

Before
Campbell, Bownes and Cyr,
Senior Circuit Judges.

ORDER OF COURT
Entered: January 31, 2002

The motion for rehearing is denied. We previously considered all matters properly before us.

By the Court:
Richard Cushing Donovan, Clerk
s/ By: JULIE GREGG
Appeals Attorney

[cc: Messrs. Ward Llambías, Rodriguez Coss, Perez Sosa]

Appendix #14

Seal :
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Office Clerk
US. DISTRICT COURT.
San Juan, PR]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
Plaintiff
V. Case No. 96-0006 (SEC)
M. A. C.
Juvenile

MOTION IN RESPONSE TO U.S. MAGISTRATE-JUDGE AIDA M. DELGADO-COLON'S ORDER OF DECEMBER 19, 1995

THE HONORABLE SALVADOR H. CASELLAS
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF PUERTO RICO

COMES NOW, LILIANA M. MENDEZ-EBRA, U.S. PRETRIAL SERVICES OFFICER OF THIS COURT, and respectfully informs that:

1. On December 19, 1995, during the juvenile's initial appearance, the Honorable Aide M. Delgado-Colón, U.S. Magistrate-Judge, ordered the undersigned to submit a social and adjustment evaluation of M.A.C.
2. On January 4, 1996, we visited the juvenile's home located at A-10 Gardenia Street, Loiza

Valley, Canóvanas, P.R., and met with his mother, Mrs. Carmen Gómez. Our investigation has revealed that the juvenile is one three children horn to Mr. Marcos Carrasquillo and Mrs. Carmen Gómez. MAC's parents have been divorced for approximately two years. As related by the mother, their marital relationship deteriorated through the years because of Mr. Carrasquillo's abuse of alcohol and illegal drugs, including heroin. The father was described as a non-caring person, who is solely interested in meeting his own needs. As stated, he was usually not involved in his children's activities, and was not concerned with what they thought of him. As a consequence of this, he did not *care* to conceal his problem with alcohol and drugs from them. According to Mrs. Gómez, his behavior was so evident that other children of the community teased the juvenile and his sisters with this matter. Although at the beginning of their marriage he worked and financially provided for his family's needs, due to his drug and alcohol addiction he could not work any longer. In fact, according to the mother, he started stealing things front the household in order to keep up with his daily drug use.

From 1976 to 1982, the juvenile lived in Harrisburg, Pennsylvania, and from 1982 to 1986 in Lawrence, Massachusetts. In Massachusetts the mother started working for the Internal Revenue Administration, and MAC's parents decided to send money to Puerto Rico in order to build a house in San Isidro, Canóvanas. In 1986 the family relocated to Puerto Rico and lived thereafter at their new home in San Isidro, After her

divorce, the mother acquired the house where she and two oil her children currently live. As stated, in order to divorce her husband by mutual consent, she accepted taking care of their personal and household debts. In addition to this, the father would not lose control of his part of the property. During our interview with the mother, she expressed guilty feelings for not having parted sooner from her ex-husband. She related how her children have been affected with their father's behavior, and disclosed also having problems with her 14-year old daughter. As revealed by the mother, defendant's father found out of his son's arrest through news media. ~e has not yet visited MAC at the institution, and, only tried to discuss the situation with the mother once, when he visited her house at 2:00 A.M. under the influence of alcohol.

3. During the prebail interview with the juvenile, he reported he received psychological treatment during a short period of time because of depression. He further explained being depressed, but failed to clarify his assertion. Defendant's mother disclosed that when he was 14 or 15 years old, MAC was sodomized by an unidentified individual. As explained by the mother, although she noticed a change in his behavior, he did not reveal this incident to her until one-and-a-half years after its occurrence. Mrs. Gómez remembered many occasions when the juvenile would come near her as if he wanted to share what was bothering him. However, it took many months before he could find the courage to discuss the matter with his mother. According to the version he gave to his mother, he had completed his shift at El Comandante Racing

Track at approximately 10 A.M. and an unknown individual offered him a ride home. The man first stopped at his house somewhere in Rio Grande and there he assaulted the minor. The mother explained that MAC's concern was that no one, especialy his friends, find out what happened to him. In addition to this, he expressed feelings of being less of a man due to that incident.

4. The juvenile dropped from school when he was in eighth grade. According to the mother, he was very affected by her marital situation with the father, The juvenile completed his eighth grade through the Job Corps. Nonetheless, this program did not meet his academic expectations; consequently, he failed to attend classes. Thereafter, on various occasions he enrolled in night school but failed to resume his studies, Mrs. Gómez verified that MAC was attending school at this Hernáiz-Verona School in Canóvanas.

5. During our initial intervention with MAC, he explained he started using marihuana approximately five months before his federal arrest According to the mother, her prior experience with her ex-husband made her 'suspect that the minor was using infrahuman. Nonetheless, whenever she asked him, he disclaimed using illegal drugs. The mother considers that his likes for marihuana are a logical consequence of his involvement with his friends.

6. As reported by the juvenile, and as corroborated through his mother, the day when MAC left Puerto Rico, he was supposed to appear at the Juvenile Court in Carolina to answer to a traffic violation. Reportedly, he and a friend were stopped by state police

officers because they were riding a motorcycle without using helmets. The boys did not disclose their true age or identities. Therefore, they were treated as adults and were remanded to a correctional facility for adults. Before the family was able to find out what happened to MAC, he had been under custody for four days.

7. Additional personal background information of this juvenile is contained in the U.S. Pretrial Services Report of December 21, 1995.

WHEREFORE, in compliance with the Honorable Aida H. Delgado Colon's order we are submitting further information of the juvenile's personal, social, family and prior delinquency history for whatever purpose is deemed proper.

In Hato Ray, Puerto Rico, this 11th day of January, 1996

Respectfully submitted,

Rafael A. Gelpi-Perez, Acting Chief

U.S. Pretrial Services Officer

s/ Liliana M. Mendez-Ebra

U.S. Pretrial Services Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this date, I have served copy of this document to Mr. Julio Morales-Sanchez, Attorney for Defendant, 268 Muñoz Rivera Avenue, Suite 1502, Hato They, Puerto Rico 00918; and to Assistant U.S. Attorney Edwin Vázquez, U.S.Federal Building Room 452, 150 Chardon Street, Hate Roy,Puerto Rico 00918—1724.

s/ Liliana M. Mendez-Ebra

U.S. Pretrial Services Officer

18 U.S.C. 5032. Delinquency proceedings in district court; transfer for criminal prosecution

" A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841) or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C 952 (a), 953, 955, 959, 960(b)(1), (2), (3)), section 922(x) or section 924(b), (g), or (h) of this title, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State. For purposes of this section, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

If an alleged juvenile delinquent is not surrendered to the authorities of a State pursuant to

this section, any proceedings against him shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information or as authorized under section 3401(g) of this title, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter [18 USCS §§ 5031 et seq.] unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile fifteen years and older alleged to have committed an act after his fifteenth birthday which if committed by an adult would be a felony that is a crime of violence of an offense described in section 401 of the Controlled Substances Act 21 U.S.C. 84, or section 1002(a), 1005, or 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, 959), or section 922(x) of this title, or in section 924(b), (g), or (h) of this title, criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice. In the application of the preceding sentence, if the crime of violence is an offense under section 113(a), 113(b), 113(c), 1111, 1113, or, if the juvenile possessed a firearm during the offense, section 2111, 2113, 2241(a), or 2241(c), "thirteen" shall be substituted for "fifteen" and "thirteenth" shall be substituted for "fifteenth". Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be

subject to the preceding sentence for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151), and which has occurred within the boundaries of such Indian country, unless the governing body of the tribe has elected that the preceding sentence have effect over land and persons subject to its criminal jurisdiction. However, a juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense, or would be an offense described in section 32, 81, 844(d), (e), (f), (h), (i) or 2275 of this title, subsection (b)(1)(A), (B), or (C), (d), or (e) of section 401 of the Controlled Substances Act (21 USCS &841 (b)(1)(A), (B), or (C), (d), or (e)], or section 1002(a), 1003, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act 21 U.S.C 952 (a), 953, 959, 960(b)(1), (2), (3)), and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution.

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's

present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems. In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.

Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. Counsel shall assist the juvenile during the transfer hearing, and at every other critical stage of the proceedings.

Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

Whenever a juvenile transferred to district court under this section is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile shall be conducted pursuant to the provisions of this chapter USCC 5032 et seq.].